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Astrid Wiik

Amicus Curiae before International Courts and Tribunals

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To my family

Preface

At first sight, one might expect that all legal systems are firmly based on fundamental concepts, implemented by settled institutions. However, in actuality, these preconditions are usually not met as the law is part of the societal, economic and political reality of a broader environment, reflective of the status of and changes in human society in both history and modern times. This situation is especially true for public international law. Here, one fundamental issue concerns the status of actors in the international legal order: are only states and international organizations subjects of modern public international law? Or do we accept that other actors, like non-governmental organizations, multinational enterprises and individuals, enter the scene to vindicate their rights (and individual protections) at the international level? Much has been written about this subject and there is still much scholarship needed to assess the great changes in, and affecting, the international legal order at the beginning of the 21st century.

The uncertainties of the current situation are also reflected in the practices of international courts and tribunals. The proliferation of these courts and tribunals over the last decades – not only with regard to the number of institutions but also in relation to the ever-growing corpus of case-law and practice – has been accompanied by a procedural phenomenon called "amicus curiae". Although the concept as such is largely unsettled, it is often understood as a procedural vehicle for non-parties, often for non-state actors without legal standing, to influence the decision-making processes of international courts and tribunals by submitting written and – occasionally – even oral statements to those courts. The admissibility of these statements is being disputed, but there is a growing tendency of permitting these interventions, at least in investment arbitration and before human rights bodies. Much attention has been paid to this development which, at a procedural level, reflects the unsettled status of actors in modern public international law. At the same time, the expansion of the amicus curiae corresponds to the pursuit of more transparency in international dispute settlement and reflects the search for more legitimacy in international dispute resolution processes as a whole.

The PhD thesis of Astrid Wiik contributes to this ongoing debate in a remarkable way: She bases her analysis on a broad empirical research by

analysing the case law and the practice of several international courts (the ICJ, the ITLOS, the ECtHR) and dispute settlement bodies such as the WTO Appellate Body and investment arbitration. Her research question does not only ask about the different variations of the amicus curiae; Astrid Wiik also wants to know to what extent amici curiae really influence international dispute settlement processes and whether the expectation that their involvement in dispute resolution would improve the outcomes in a positive way is really justified. It does not come as a surprise that she comes up with a much more nuanced result than other studies in this field. Indeed, this PhD is the first on the amicus curiae phenomenon which is based on a comprehensive review of the practice of international courts and tribunals.

This PhD was written in the framework of the International Max Planck Research School on Successful Dispute Resolution. This Doctoral School was originally organized by the Institute for Comparative Law, and Business Law of the University of Heidelberg and the Max Planck Institute Heidelberg for Comparative Public Law and International Law. In the meantime, the Max Planck Institute Luxembourg for European, International and Regulatory Procedural Law joined the School, as did the Law Faculty of the University of Luxembourg. When she worked on her PhD, Astrid Wiik was strongly involved in the debates of the students and their supervisors; the School offered her the opportunity to spend some time at the Permanent Court of Arbitration in The Hague where she obtained many insights into the "real" world of international dispute settlement. Her study profited considerably from an academic environment which permitted her to engage in comparative research at different research centres in Europe (including Heidelberg, Cambridge and The Hague).

After several years of steady work, this PhD project has been successfully completed. This is a great moment, not only for the candidate, but also for the supervisor who has accompanied the author throughout the process. In the case of Astrid Wiik, it was my pleasure to see her research expanding and to share the upcoming results with Rüdiger Wolfrum as a co-supervisor. And I'm also glad to see that Astrid Wiik has started an academic career at Heidelberg University.

Luxembourg, 8 February 2018 *Burkhard Hess*

Acknowledgments

This book is the outcome of a (long) journey that started at Heidelberg University in 2009, with a keen interest in the role and functioning of international courts and tribunals in the 21st century in view of the changing landscape of actors in the international arena. The concept of *amicus curiae* was repeatedly mentioned in literature as a tool to improve international dispute settlement. However, case law from inter-state courts and the WTO Appellate Body indicated a strong suspicion of this instrument. The lack of a definition of the instrument before any of the international courts and tribunals reviewed when I first embarked on this topic did not contribute to its reputation. Accordingly, the study was based on two aims: first, to grasp the reality of *amicus curiae* before international courts and tribunals. Second, to contrast this reality – including the effectiveness of the instrument – with the expectations attributed to it. The dissertation was written between 2009 and 2014. For the publication, new developments until November 2016 were included. During the years of writing the dissertation and preparing the book, *amicus curiae* practice has continued to expand and solidify, and definitions of the concept before some courts and an increasing number of codifications were achieved. It is the hope that this book will make a humble contribution to the ongoing debates and codification efforts surrounding *amicus curiae*.

This endeavor would not have been possible without the continuous support of my supervisor Professor Burkhard Hess, to whom I am most indebted for his patient guidance and precious advice throughout the writing of the Ph.D. and until its publication. I am also deeply grateful to Professor Rüdiger Wolfrum for his highly valuable feedback on the Ph.D. (and general matters of academia). Without their directive encouragement and advice, I would not have embraced the excitement and uncertainties of an academic career. I would also like to thank Dr. Karin Oellers-Frahm for first pointing me to the topic and for sparking my interest in international dispute settlement.

Thanks to Professor Hess and Professor Wolfrum, I was accepted into the Graduate Academy on Successful Dispute Resolution and the International Max Planck Research School for Successful Dispute Resolution in International Law. Like the Institute for Comparative Law, Conflict of

Laws and International Business Law at Heidelberg University and the Max Planck Institute for Comparative Public Law and International Law, it provided an inspiring work environment in Heidelberg. I also had the pleasure to spend some time as a visiting fellow at the Lauterpacht Centre for International Law in Cambridge in the springs of 2010 and 2011, and I would like to thank its then Director Professor James Crawford and the staff and visitors at the Centre for their warm welcome. I am further indebted to my friends and former colleagues at the Permanent Court of Arbitration. The many discussions on and off topic with professors, friends and colleagues, as well as the overall vibrant research communities in Heidelberg, Cambridge, and The Hague formed a constant source of motivation and new insights into the field of international dispute settlement.

At all the mentioned places, friends and colleagues provided comments, encouragement and the requisite amount of humor and patience to make the experience worthwhile. I am particularly grateful to Natasa Mavronicola, Evgeniya Goriatcheva, Magdalena Słok-Wodkowska, Constanze von Roeder, Jara Mínguez, Naya Pessoa, Katharina Domke-Schmidt, Elisa Novic, Sonja Firl, Clemens Zick, Lisa Staben, Yanying Li, Andreas Laupp, Martin Doe, Margret Solveigardottir and Judith Ulshöfer for reading and commenting on chapters and outlines of the dissertation, for helping with IT and formatting matters, and for tea, cookies and encouragement.

I am also grateful for the generous financial support provided by the Landesstiftung Baden-Württemberg, the IMPRS-SDR and the German Academic Exchange Service DAAD, and to Nomos and Hart Publishing and the editors of the series for offering me the opportunity to publish the dissertation.

Words are insufficient to thank my extended family for the immense support and cheerleading that I have received from over the years. My parents' intellectual curiosity in this world, their humanist values and their love are key guideposts in my life, for which I am very grateful. My siblings have always been great companions, and I would like to thank them for their support and particularly Ivar for his help during the final stretch of the dissertation. I would also like to thank my Mexican family, Nora and Jorge Zertuche, and my Heidelberg family, Volker and Charlotte Soergel, for their interest in my work, their help and many happy hours and inspiring conversations. I would like to dedicate this book to them all.

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Table of Abbreviations

ACHR	American Convention on Human Rights
BIT	Bilateral Investment Treaty
CAFTA	Dominican Republic-Central America Free Trade Agreement
CEJIL	Center for Justice and International Law
CIEL	Centre for International Environmental Law
DSU	Dispute Settlement Understanding
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECtHR Rules	Rules of the European Court of Human Rights
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FTC	Free Trade Commission (NAFTA)
FTC Note	FTC Note of Interpretation of Certain Chapter 11 Provisions
FTC Statement	FTC Statement on non-disputing party participation
GPI	Stichting Greenpeace International
IACtHR	Inter-American Court of Human Rights
IACtHR Rules	Rules of the Inter-American Court of Human Rights
IACtHR Statute	Statute of the Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rules	Rules of Procedure of the International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea

ITLOS Rules	Rules of the International Tribunal for the Law of the Sea
ITLOS Statute	Statute of the International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IUSCT	Iran-United States Claims Tribunal
MIT	Multilateral investment treaty
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
OAS	Organization of American States
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
SPS Agreement	The WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	WTO Agreement on Technical Barriers to Trade
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Chapter § 1 Introduction

Amici curiae skyrocketed to international fame in the late 1990 after the WTO Appellate Body decided in *US–Shrimp* that panels possessed an unwritten authority to accept submissions from non-governmental organisations lobbying for the inclusion of environmental standards in trade disputes.[1] The admission by investment arbitration tribunals of equally unsolicited *amicus curiae* submissions by non-state actors a few years later firmly entrenched the issue on the agenda of trade and investment law practitioners.[2] In the heat of the debate, few realized that *amicus curiae* participation was quite common before many other international courts and tribunals. The ECtHR, the IACtHR and most international and hybrid criminal tribunals had a thriving *amicus curiae* practice, and even the ICJ and the IUSCT had had (admittedly few and sporadic) encounters with the concept.

What is *amicus curiae*? Latin for 'friend of the court' the term indicates that *amicus curiae* is an instrument for the benefit of the court, that it assists it in some manner – with the term 'friend' indicating that it is not obliged to do so. An often-quoted entry in Black's Law Dictionary defines *amicus curiae* as '[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.'[3] This view is not unchallenged. Some require *amicus curiae* to act as an uninterested and neutral assistant.[4] Others see *amici* as lobbyists of their own, a public

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1 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter: *US–Shrimp*), Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 83.

2 *Methanex Corporation v. United States of America* (hereinafter: *Methanex v. USA*), Decision of the Tribunal on Petitions from Third Persons to Intervene as *'Amici Curiae'*, 15 January 2001; *United Parcel Service of America Inc. v. Canada* (hereinafter: *UPS v. Canada*), Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001.

3 B. Garner, *Black's law dictionary*, 7th Ed., St. Paul 1999, p. 83.

4 G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), p. 778 (*Amicus curiae* is 'a private person or entity who has no direct legal interest at stake in the dispute at hand [and]

or the parties' interests.[5] The plethora of views held in academia (and in national legal systems) is reflected in the practice of international courts and tribunals. With the exception of the IACtHR, international courts and

may submit an unsolicited report to the court in which such person or entity may articulate its own view on legal questions and inform the court about factual circumstances in order to facilitate the court's ability to decide the case.'. [References omitted].); *The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78, Decision on *amicus curiae* request by the Kigali Bar Association, 22 February 2008, Rec. No. ICTR-02-78-0091/1, para. 7 ('[J]urisprudence indicates that the role of an *amicus curiae* is not to represent the interests of a particular party, but rather to assist the court by providing an objective view in relation to the issues under consideration.'); P. De Cesari, *NGOs and the activities of the ad hoc criminal tribunals for former Yugoslavia and Rwanda*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 119 ('If the authorization does not indicate exactly the amount of information required, the NGO must try not to broaden the scope of its opinion ... Leave is normally granted for technical and limited support and not recommendations or suggestions. The aim of *amicus curiae* participation is to assist the judicial process and not to attempt to put pressure on it.').

5 P. Mavroidis, *Amicus curiae briefs before the WTO: much ado about nothing*, in: A. v. Bogdandy et al. (Eds.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, p. 317; C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 Aussenwirtschaft (2005), p. 348 ('[T]oday's *amici* try to highlight factual or legal aspects associated with their specific concerns or interests.'); M. Frigessi di Rattalma, *NGOs before the European Court of Human Rights: beyond amicus curiae participation*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 57 ('[A]n *amicus curiae* is a person or organization with an interest in or view on the subject matter of a case who, without being a party, petitions the ECHR for permission to file a brief suggesting matters of fact and of law in order to propose a decision consistent with its views. The interest of an *amicus* tends to be of a general nature, such as the desire to promote public interests.'); Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 821 ('Broadly defined, *amici curiae* are natural or legal persons who, without being parties to the case, submit their views to the court on matters of fact and law, in the pursuit of a public interest related to the subject matter of the case.').

tribunals largely have abstained from defining the concept and its functions.[6] Overall, the term *amicus curiae* is vague and unclear.[7]

Despite these uncertainties, many NGOs support the notion of *amicus curiae* participation in international dispute settlement. The concept is lauded as an opportunity to introduce public values into trade and investment-focused legal regimes whose dispute settlement processes are said to operate so effectively as to stymie national measures issued by democratically elected governments and parliaments in the public interest.[8] Many scholars and NGOs argue that some form of participation for affected individuals and communities is indispensable to ensure the continued legitimacy of international adjudication. They welcome *amicus curiae* as an agent of change from a state-focused to a peoples-focused dispute settlement system where the selective espousal of national interests by states can be mitigated by this form of direct participation.[9]

However, not all view the instrument positively. Many states and international practitioners on and before the benches worry that its involve-

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6 Exception: *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic* (hereinafter: *Suez/Vivendi v. Argentina*), Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para.13. See *also The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Decision on ADAD's (The organisation of ICTR defence counsel) motion for reconsideration of request for leave to appear as *amicus curiae*, 1 July 2008, para. 10, where the ICTR emphasizes that *amicus curiae* participation is at the discretion of the Chamber and that it serves to assist the Chamber 'in its consideration of the questions at issue, and in the proper determination of the case before it.' But see *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium, 6 June 1998, where the ICTR found that an *amicus* may have 'strong interests in or views on the subject matter before the court.'

7 C. Tams/C. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45 Archiv des Völkerrechts (2007), p. 220 (‚Der Begriff *amicus curiae* ist schillernd und wird vielfach verwendet.'); J. Bellhouse/A. Lavers, *The modern amicus curiae: a role in arbitration?*, 23 Civil Justice Quarterly (2004), p. 187.

8 R. Higgins, *International law in a changing international system*, 58 Cambridge Law Journal (1999), p. 85.

9 CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 2 ('Given that decisions rendered by international courts and tribunals increasingly affect a myriad of public interest issues, there is a need to ensure that those dispute resolution bodies do not view the cases before them in an artificially myopic manner, but that they adequately consider the context and social implications of, and the interests affected by, the cases before them.' [References omitted].).

ment places an unjustifiable burden on the parties. They fear that the admission of *amici curiae* ruptures the delicate compromise represented in international treaties on what international courts and tribunals decide on and in which manner.[10] Others fear a blurring of the primary function of dispute settlement: the rendering of a workable and acceptable solution of the parties' dispute. The issues *amici curiae* seek to table are often viewed as potentially further antagonizing the parties and impeding 'the complex process of interest-accommodation that third party dispute settlement inevitably entails.'[11] Concerns are not limited to procedural matters: it is argued that the WTO and investment treaties have been drafted technically to keep politics out of the proceedings and to ensure a smooth functioning of the global trade system. Allowing *amici* to participate in adjudicative proceedings, many fear, might repoliticize disputes and, in the worst case, limit trade and foreign direct investments.[12]

In short, the issue of *amicus curiae* raises not only intricate procedural questions, but it engages the fundamental purpose of international dispute settlement in today's globalizing world.[13] The issue's relevance is augmented in light of the ever-increasing importance of international dispute settlement, which is reflected in the growth in number of international courts and tribunals and the cases brought before them.

Hence, it is not surprising that in the last fifteen years the instrument has become the subject of extensive academic interest. Research has focused largely on analyses of *amicus curiae* before individual adjudicating bodies, especially the WTO dispute settlement system and investor-state arbitration. To date, there is no comprehensive study of *amicus curiae* before international courts and tribunals examining its role and accommoda-

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10 For many, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion Judge Buergenthal, ICJ Rep. 2003, p. 279, para. 22.

11 A. Bianchi, *Introduction*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, p. xxii.

12 WTO General Council, *Minutes of Meeting* of 22 November 2000, WT/GC/M/60, Statement by Brazil, para. 46.

13 T. Treves, *Introduction*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 1-2 ('[I]ncreased weakness of the dogma that the state is the only actor in international relations'). See also R. Mackenzie/C. Romano/Y. Shany/P. Sands, *Manual on international courts and tribunals*, 2nd Ed. Oxford 2010, p. xv.

tion in international proceedings, its effectiveness and its effect on international dispute settlement.[14] This contribution seeks to close this gap.

The aim of this study is twofold: first, to obtain a deeper understanding of *amicus curiae* before international courts and tribunals: its characteristics, its functions and how it is dealt with. The second aim is to examine if the concept, as currently used and regulated, is of added value to international dispute settlement.

A. Structure

The main decision concerning the structure of this study was whether to examine *amicus curiae* before each international court and tribunal[15] separately or to approach the different issues topically. The latter approach was chosen to allow for direct comparisons and keep the focus on the instrument and not on the particularities of a certain international court or tribunal, although they determine much of the role and development of *amicus curiae* in each court.

This book is structured in three parts. The first part, Chapters 2-4, sketch the international *amicus curiae*. Chapter 2 presents the above-indicated presumed functions and drawbacks of *amicus curiae* participation in order to provide a backdrop against which to assess the instrument throughout this book. Chapter 3 examines the national law origins and the development of the instrument before international courts and tribunals to show the variety of concepts held of *amicus curiae* in national legal systems and to highlight the different settings and conditions under which

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14 Several studies of *amicus curiae* served as starting points for this study. Two articles were of particular value: an article by *Lance Bartholomeusz* published in 2005, which constitutes the most comprehensive study of the concept so far, and a book chapter authored by *Christine Chinkin* and *Ruth Mackenzie*. See L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 Non-State Actors and International Law (2005), pp. 209-286; C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'* in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, pp. 295-311.

15 This is usually done, see L. Bartholomeusz, supra note 14; D. Hollis, *Private actors in public international law: amicus curiae and the case for the retention of state sovereignty*, 25 Boston College International and Comparative Law Review (2002), pp. 235-255; A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005.

amici curiae were first admitted. Chapter 4 distils the current characteristics and functions of *amicus curiae* before international courts and tribunals and delineates it from other forms of non-party involvement in international dispute settlement.

The second part of this book examines the laws and practices of *amicus curiae* participation before international courts and tribunals. It forms the empirical and analytical foundation of the study. Chapter 5 explores the legal bases for *amicus curiae* participation and its admission to the proceedings. Chapter 6 examines the instrument in the proceedings, including the modalities of participation, the formal and substantive requirements attached to submissions and their content.

The third part of this book, Chapters 7-8, drawing from the examination in the second part, addresses the second aim of the study: the added value of *amicus curiae* participation. Chapter 7 explores the substantive effectiveness of the concept. It evaluates how and to what extent international courts and tribunals have relied on submissions in their decision-making. Chapter 8 analyses the effect of *amicus curiae* on international dispute settlement as such. In particular, it considers whether the concept has fulfilled the positive and/or negative expectations surrounding it.

B. Methodology

This study pursues an analytical approach. Normative considerations only play a role when analysing the sufficiency of current regulations. The focal point of this study is the law *de lege lata*.

The research is based on the laws and cases of the included international courts and tribunals, academic literature and select *amicus curiae* submissions. Unless indicated otherwise, the statutes, procedural rules and other international treaties referred to are those applicable as of 15 November 2016.[16] The corpus of case law of each court was researched

16 United Nations, Statute of the International Court of Justice, entered into force 18 April 1946 (hereinafter: *ICJ Statute*); International Court of Justice, Rules of Court, entered into force 1 July 1978 (last amendment entered into force 14 April 2005) (hereinafter: *ICJ Rules*); International Court of Justice, Practice Directions, first adopted October 2001, and last amended on 21 March 2013 (hereinafter: *ICJ Practice Directions*), all at: http://www.icj-cij.org/en/practice-directions (last visited: 28.9.2017); United Nations Convention on the Law of the Sea of 10 December 1982, entered into force 16 November 1994 (hereinafter: *UNCLOS*) at: http://www

with a view to identifying cases with *amicus curiae* participation. This

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.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last visited: 28.9.2017); Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea, entered into force 16 November 1994 (hereinafter: *ITLOS Statute*), at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf (last visited: 28.9.2017); Rules of the International Tribunal for the Law of the Sea (ITLOS/8), adopted on 28 October 1997 (last amendment 17 March 2009) (hereinafter: *ITLOS Rules*), at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf (last visited: 28.9.2017); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, and as entered into force with the latest amendment on 1 June 2010 (hereinafter: *ECHR*), at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited: 28.9.2017); European Court of Human Rights, Rules of Court, adopted 18 September 1959 (last amendment entered into force 14 November 2016) (hereinafter: *ECtHR Rules*), at: http://www.echr.coe.int/Documents/Library_2015_RoC_ENG.PDF (last visited: 28.9.2017); Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the Organisation of American States by Resolution No. 448, entered into force on 1 January 1980 (hereinafter: *IACtHR Statute*), at: http://www.corteidh.or.cr/index.php/en/about-us/estatuto (last visited: 28.9.2017); Inter-American Court of Human Rights, Rules of Procedure, as approved by the Court at its LXXXV Regular Period of Sessions, from 16-28 November 2009 (hereinafter: *IACtHR Rules*), at: http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf (last visited: 28.9.2017); African (Banjul) Charter on Human and Peoples' Rights, entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 (hereinafter: *African Charter*), at: http://en.african-court.org/images/Basic%20Documents/charteang.pdf (last visited: 28.9.2017); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, at: http://en.african-court.org/images/Basic%20Documents/africancourt-humanrights.pdf (last visited: 28.9.2017); African Court on Human and Peoples' Rights, Rules of Court, as entered into force on 2 June 2010 (hereinafter: *ACtHPR Rules*), at: http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf (last visited: 28.9.2017); Practice Directions, as adopted at the Fifth Extraordinary Session of the Court, held from 1-5 October 2012 (hereinafter: *ACtHPR Practice Directions*), at: http://en.african-court.org/images/Basic%20Documents/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf (last visited: 28.9.2017); World Trade Organization, Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement (hereinafter: *WTO DSU*), at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited 28.9.2017); WTO Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6, as entered into force on 15 September 2010, at: https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (last visited 28.9.2017); International Centre for the Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of

was necessary given the lack of a full set of current data before all of the courts examined.[17] A list of all cases with *amicus curiae* practice that were included in this study is annexed to this book (Annex I). Judgments and decisions rendered before or on 15 November 2016 were considered. The laws and practices of each court were compared based on the methods of comparative law.[18] Although traditionally defined as an area of law that compares foreign national laws, these methods are applicable to the comparison of the practices and laws of international courts and tribunals on the assumption that each court perceives the others courts' laws and practices as alien.[19]

Other States, as amended and effective 10 April 2006 (hereinafter: *ICSID Convention*), at: https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx (last visited 28.9.2017); ICSID Arbitration Rules, entered into force on 1 January 1968 (last amendment entered into force 1 January 2003), at: https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx (last visited: 28.9.2017); United Nations Commission on International Trade Law Arbitration Rules, with new article 1, paragraph 4, as adopted in 2013 (hereinafter: *2013 UNCITRAL Arbitration Rules*), at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (last visited: 28.9.2017); UNCITRAL Arbitration Rules, as revised in 2010 (hereinafter: *2010 UNCITRAL Arbitration Rules*), at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited: 28.9.2017); UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, as entered into force on 1 April 2014, (hereinafter: *UNCITRAL Rules on Transparency*), at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (last visited: 28.9.2017).

17 For a set of data on NGOs appearing as *amicus curiae* before the ECtHR, see L. Van den Eynde, *An empirical look at the amicus curiae practice of human rights NGOs before the European Court of Human Rights*, 31 Netherlands Quarterly of Human Rights (2013), pp. 271-313.

18 See K. Zweigert/H. Kötz, *Introduction to comparative law*, 3rd Ed. Oxford 1998, pp. 43-47. With respect to the difficulties related to comparative law studies in arbitration, see R. Schütze, *Schiedsgerichtsbarkeit und Rechtsvergleichung*, 110 Zeitschrift für vergleichende Rechtswissenschaft (2011), pp. 89-90.

19 B. Burghardt, *Die Rechtsvergleichung in der völkerstrafrechtlichen Rechtsprechung*, in: S. Beck/C. Burchard/B. Fateh-Moghadam (Eds.), *Strafrechtsvergleichung als Problem und Lösung*, Baden-Baden 2011, pp. 236-237; K. Zweigert/H. Kötz, supra note 18, p. 8. Critical, A. Watts, *Enhancing the effectiveness of procedures of international dispute settlement*, 5 Max Planck Yearbook of United Nations Law (2001), p. 21 ('[Procedural q]uestions can in practice only be pursued on a tribunal-by-tribunal basis.').

The empirical approach faced several difficulties. Although an attempt at comprehensiveness was made, the breadth of the study and wealth of case law will have led to inadvertent, hopefully minor, omissions of relevant cases or aspects, especially as not all courts provide a central searchable database. Moreover, judgments tend to refer only sporadically, if at all, to *amicus curiae* participation and official case records are rarely accessible. Many aspects of *amicus curiae* participation are addressed only in the courts' correspondence, which is usually not publicly accessible.

A crucial initial challenge was the decision which international courts and tribunals to include in the study. Not all international courts and tribunals use the term *amicus curiae*. Moreover, definitions of the concept are numerous and diverging. The term *amicus curiae* is explicitly mentioned in the governing laws of the ICTY, the ICTR, in the ICC and the SCSL Rules of Procedure and Evidence, the IACtHR Rules of Procedure, and in numerous cases before the ECtHR, the IACtHR, the ICC, the ICTY, the ICTR, the SCSL, the STL, WTO panels, the WTO Appellate Body and investor-state arbitration tribunals. Some international courts and tribunals choose not to use the term to avoid connotations associated with any national legal concept. In 2011, the UNCITRAL Working Group II discussed whether the term should be used in its new rules on transparency. The Report of the 55th Session summarizes the discussions that led to the use of the term 'third party':

> It was said that that notion was well known in certain legal systems, where it was used in the context of court procedure. *Amicus curiae* participation in arbitral proceedings was said to be a more recent evolution. In order to provide rules that would be understood in the same manner in all legal systems, it was recommended to avoid any reference to the term "*amicus curiae*" and to use instead words such as "third party submission", "third party participation", or other terms with similar import. That proposal received support.[20]

This study relies on a functional approach to the term. Relying on shared characteristics of the concept before the international courts and tribunals reviewed, as will be detailed in Chapter 4, this study considers as *amicus curiae* all forms of participation where a non-party to the proceedings that has an interest in the proceedings or its outcome submits to the court for

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20 Report of the UNCITRAL Working Group II (Arbitration and Conciliation on the Work of its fifty-fifth session), 55th Session, UN Doc. A/CN.9/736 (2011), para. 71 [Emphasis added].

its consideration information without a right to have the information accepted or considered.

C. Scope of the study

The definition of *amicus curiae* has led to the exclusion from this study of the following forms of non-party participation in international courts and tribunals: intervention, participation as of right by non-disputing member states to the treaty in dispute,[21] victim participation in the IACtHR pursuant to Article 25 IACtHR Rules, participation of the expert witness on the inter-American public order of human rights under Article 35 IACtHR Rules, participation by the national state of the applicant pursuant to Article 36(1) ECHR and participation by the Council of Europe Commissioner of Human Rights pursuant to Article 36(3) ECHR.[22] Often, the differences between these forms of participation and *amicus curiae* are only marginal and formal (see Chapter 4).

Participation by international organizations before the ICJ is more complex. Article 34(3) ICJ Statute in connection with Article 69(3) ICJ Rules empowers the ICJ to invite a public international organization whose constituent instrument or any other instrument adopted under it is in question to submit observations in writing. Article 43(2) and (3) ICJ Rules in connection with Article 69(2) ICJ Rules clarifies that in this case the public international organizations may submit observations *proprio motu* under the procedure established by Article 69(2) ICJ Statute. This form of participation was excluded from the study, because the ICJ is obliged to consider the submissions made, and functionally and historically, it relates to intervention pursuant to Article 63 ICJ Statute. However, Article 34(2) ICJ

21 See Article 5 UNCITRAL Rules on Transparency, Article 1128 NAFTA. See also the possibility of participation by the 'competent tax authorities' pursuant to Article 26(5)(b)(i) Energy Charter Treaty.

22 The provision was introduced upon request by the Council of Europe Commissioner for Human Rights. See Explanatory Note to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, ETS No. 194, Agreement of Madrid, 12 May 2009, paras. 86-87.

Statute was included in the study, because applicants for leave to participate as *amicus curiae* have invoked the provision as a legal basis. [23]

The book takes a pragmatic approach with respect to the selection of the international courts and tribunals to include in the study. In 2011, *De Brabandere* counted 22 international courts and 60 quasi-judicial, implementation control and other dispute settlement bodies.[24] It is obvious that this contribution cannot cover them all. Definitions of what constitutes an international court or tribunal vary.[25] This study considers as international courts all institutions established by international law, which are composed of independent judges and issue legally binding decisions based on law in proceedings involving as a party at least one state or intergovernmental organization.[26] The requirements of permanency of judges and predetermined procedural rules were dropped to include investor-state arbitration tribunals. Further, the WTO Appellate Body and panels have been included, although their reports become legally binding only upon adoption by negative consensus in the Dispute Settlement Body.[27] Essentially,

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23 M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 209-210. An obligation to submit requested information may be agreed to in a relationship agreement between the UN and the organization pursuant to Articles 57 and 63 UN Charter. *Benzing* refers to Article IX(1) Agreement between the UN and the ILO and Article IX(1) Agreement between the UN and the FAO.

24 E. De Brabandere, *Non-state actors in international dispute settlement: pragmatism in international law*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London et al. 2011, pp. 342-359.

25 C. Brown, *A common law of international adjudication*, Oxford 2007, pp. 10-11, with more references.

26 The definition proposed by *Romano* has gained some popularity. According to him, an international court is a permanent institution, which is composed of independent judges, adjudicates disputes between at least two entities at least one of which is a state or intergovernmental organization, operates on predetermined procedural rules, and issues legally binding decisions. C. Romano, *The international judiciary in context: a synoptic chart*, 2004, at: http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (last visited: 28.9.2017). See also the similar definition by I. Brownlie, *Principles of public international law*, 6th Ed., Cambridge 2003, p. 676. See also C. P. Romano/K. J. Alter/Y. Shany, *Mapping international adjudicative bodies, the issues, and players*, in: C. P. Romano/K. J. Alter/Y. Shany (Eds.), *The Oxford handbook of international adjudication,* Oxford 2014, p. 5.

27 Cf. Articles 2(4), 16(4), 17(14) DSU. See for many, D. McRae, *What is the future of WTO dispute settlement?*, 7 Journal of International Economic Law (2004), p. 4.

this study includes judicial and quasi-judicial institutions that are usually considered international courts or 'quasi-courts' and that have *amicus curiae* practice.

A few words are necessary on investor-state arbitration.[28] The scope of this study does not permit a consideration of all of the approximately 3300 bilateral and multilateral investment treaty regimes.[29] Also because of the difficulties in obtaining information on the traditionally confidential investor-state arbitrations, the examination of investment disputes has been limited to cases with *amicus curiae* participation that were accessible through the websites of the ICSID, the PCA, the NAFTA and private investment arbitration databases such as italaw.com. Most of the cases considered were conducted under the institutional procedural rules of the ICSID or the UNCITRAL, which govern the majority of investor-state arbitrations.[30]

The definition excludes all *non-international* courts. *Amicus curiae* practice before national courts, though abundant, is addressed only to the extent it is necessary for the analysis of the concept before international courts and tribunals. The definition further excludes all international *non-courts*, such as monitoring and implementation control bodies.[31] Because

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28 Investment treaties bestow a national from a state party to the treaty with the right to initiate binding arbitration against another state party (the 'host state') for an injury suffered by the national in relation to an investment due to a measure that is inconsistent with substantive obligations guaranteed in the treaty and for which the host state is liable. E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 Berkeley Journal of International Law (2011), p. 202.

29 UNCTAD, *IIA issues note, recent developments in investor-state dispute settlement*, No. 1, 2015, p. 2, at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (last visited: 28.9.2017); UNCTAD, Investment Policy Hub, at: http://investmentpolicyhub.unctad.org/IIA (last visited: 28.9.2017).

30 For the argument that investment arbitration is a system of international law, see S. Schill, *The multilateralization of international investment law*, Cambridge 2009.

31 E.g. UN Human Rights Council, Committee on the Elimination of Racial Discrimination, Committee Against Torture, Inter-American Commission on Human Rights, Inter-African Commission on Human and Peoples' Rights, and implementation monitoring bodies established by environmental agreements. See G. Rubagotti, *The role of NGOs before the United Nations Human Rights Committee*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 67-92; L. Boisson de Chazournes, *The World Bank Inspection Panel: about public participation and dispute*

of their functional comparability to national labour courts, international administrative tribunals are also excluded.

Based on this approach, the following courts and tribunals were included in this study: the International Court of Justice, the International Tribunal for the Law of the Sea including its specialized Seabed Disputes Chamber, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights, the panels and Appellate Body of the World Trade Organization and investor-state arbitration tribunals including the Iran-United States Claims Tribunal. The scope of analysis covers both contentious and advisory proceedings.[32]

This selection does not claim to be comprehensive.[33] Notable is the exclusion of the Courts of the European Union and international and hybrid criminal courts and tribunals.

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settlement, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 187-203.

32 The advisory practice of the ECtHR is not considered. Article 47 ECHR endows the ECtHR with advisory jurisdiction for certain questions of interpretation of the ECHR and its Protocols. Rule 82 ECHR Rules subjects proceedings to Articles 47-49 ECHR, Chapter IX ECHR Rules and those provisions of the Rules the court considers 'appropriate'. Pursuant to Rule 84(2), contracting parties may submit written comments on the request. In its three advisory proceedings, the court has received written submissions from its member states. In two cases, it also received submissions from the Parliamentary Assembly. The ECtHR acknowledged the submissions, but it did not provide any legal justification for their admission. As an organ composed of representatives of national parliaments of the contracting states, the court may have considered it equivalent to member states' submissions. See *Decision on the Competence of the Court to give an advisory opinion*; *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, para. 3; *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2)* of 22 January 2010.

33 Inter-state arbitration is only referred to incidentally. So far, arbitral tribunals in two publicly known cases have received *amicus curiae* submissions: In the *Arctic Sunrise Arbitration,* the tribunal received (and rejected) a submission from Stichting Greenpeace Council. See *Arctic Sunrise Arbitration (the Kingdom of the Netherlands v. the Russian Federation),* Procedural Order No. 3 (Greenpeace International's Request to File an *Amicus Curiae* Submission) of 8 October 2014. In the *South China Sea Arbitration*, the Chinese (Taiwan) Society of International Law submitted an *amicus curiae* brief. The tribunal did not officially admit the brief. However, the brief is referenced in the portion of the award detailing non-

The exclusion of international and internationalized criminal courts and tribunals results from the realization that the scope of the study was too broad. Further, their purpose – the assertion of individual criminal liability – entails notable differences in their procedures, which, combined with the richness of their *amicus curiae* practice, warrants a separate study.[34]

The Courts of the European Union[35] are excluded from the scope of this study for another reason. The basic mandate of the ECJ is to ensure the uniform interpretation and application of primary and secondary EU law. With regard to the ECJ's own approach to its role, *Stein* argues that 'the Court has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology.'[36] This unique position somewhere between a national and an international court renders difficult a comparison of the procedural practices of the ECJ with other international courts.[37] In addition, the ECJ provides for other forms of non-party participation, limiting the need and likelihood of

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participating China's position. See *South China Sea Arbitration (Republic of the Philippines and the People's Republic of China), Award, 12 July 2016, PCA Case No. 2013-19* para. 449, FN 487. The parties held diverging views on the participation of *amici curiae*. While the Philippines saw it within the power of the tribunal to admit *amicus* briefs, China, in a letter to the tribunal, expressed its 'firm opposition' to *amicus curiae* submissions (and state intervention). *Id*., paras. 41, 42, 89. For the EFTA Court, see J. Almqvist, *The accessibility of European Integration Courts from an NGO perspective*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 276. For individuals in the Mercosur system, see M. Haines-Ferrari, *Mercosur: individual access and the dispute settlement mechanism*, in: J. Cameron/ K. Campbell (Eds.), *Dispute resolution in the World Trade Organization*, London 1998, pp. 270-284. For *amicus curiae* before African human rights bodies, see F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 Journal of African Law (2014), pp. 22-44.

34 See S. Williams/H. Woolaver, *The role of amicus curiae before international criminal tribunals*, 6 International Criminal Law Review (2006), pp. 151-189.

35 Article 19(1) TEU determines that the Court of Justice of the European Union includes the European Court of Justice (hereinafter: ECJ), the General Court and specialized courts.

36 E. Stein, *Lawyers, judges and the making of a transnational constitution,* 75 American Journal of International Law (1981), p. 1. See also H. Rengeling/A. Middeke/M. Gellermann et al., *Handbuch des Rechtsschutzes in der Europäischen Union*, 3rd Ed., Munich 2014, p. 37, para. 2.

37 See T. Oppermann/C. Classen/M. Nettesheim, *Europarecht*, 5th Ed., Munich 2011, p. 67, para. 152; H. Rengeling/A. Middeke/M. Gellermann, supra note 36, p. 46, para. 17.

an introduction of *amicus curiae* participation.[38] Pursuant to Article 23 ECJ Statute, the parties to the national dispute that is referred, the European Commission (EC) and the EU member states have a right to submit written statements to the ECJ in cases where the validity or interpretation of an act is in dispute. Article 40 ECJ Statute permits intervention by member states in contentious proceedings. Further, the institute of the Advocate General serves to represent the public interest.[39] Despite the significant differences in terms of functions and rights, these forms of participation have prompted comparison with *amicus curiae*, because they can highlight aspects relevant for the interpretation of the provisions in dispute.[40]

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38 The concept is not unknown in European law. Article 15(3) *Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 TEU* grants the European Commission and the competition authorities of the member states a right to make written submissions as *amicus curiae* in national proceedings relating to the application of Articles 81 and 82. The modalities of participation were elaborated in Case C-429/07, *Belastingdienst/P/kantoor P v. X BV* [2009] and in the Opinion of Advocate General Mengozzi of 5 March 2009. The EC has relied on Article 15(3) to make submissions in seventeen cases so far, see http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html (last visited: 28.9.2017). See also E. Barbier de La Serre/M. Lavedan, *Une leçon de la Cour sur l'ampleur de l'amitié: la Commission amicus curiae et les juridictions nationales*, 21 Révue Lamy de la Concurrence: droit, économie, régulation, pp. 68-71; R. Urlings, *De Commissie als amicus curiae en het fiscale karakter van een mededingingsboete*, Nederlands tijdschrift voor Europees recht (2009), pp. 288-293; P. Van Nuffel, *Ode an die Freu(n)de – the European Commission as amicus curiae before European and national courts*, in: I. Govaere/D. Hanf (Eds.), *Scrutinizing internal and external dimensions of European Law – liber amicorum Paul Demaret*, Vol. I, Brussels 2013, pp. 267-278. Arguing for an extension of third party participation to *amicus curiae* before the ECJ, E. Bergamini, *L'intervento amicus curiae: recenti evoluzioni di uno strumento di common law fra Unione europea e Corte europea dei diritti dell'uomo*, 42 Diritto communitario e degli scambi internazionali (2003), pp. 181, 186, 188.

39 The Advocate General represents the public and community interest in the form of 'reasoned submissions' written from the perspective of European law. See Article 252 TEU (ex Art. 222 EC). See also T. Oppermann/C. Classen/M. Nettesheim, supra note 37, p. 66, para. 143.

40 Case C-137/08, *VB Pénzügyi Lízing Zrt. V. Ferenc Schneider* [2010], closing argument of Advocate General Trstenjak of 6 July 2010, para. 80 (The arguments of member states submitted in proceedings before the ECJ are 'comparable to the submissions of an *amicus curiae* in so far as they are intended exclusively to support the Court of Justice in reaching a decision.' [References omitted].). See also

A final word concerning terminology seems appropriate due to the variety of terms used to describe *amicus curiae* participation. This contribution uses the terms *amicus curiae, amicus, amici curiae* and *amici*. The term 'international *amicus curiae*' is used to address *amici curiae* before international courts collectively. The use of the term '*amicus* intervention' is avoided. It confuses intervention and *amicus*. The term 'third party' will not be used as some international courts use it for different forms of non-party involvement.[41] The terms 'international courts and tribunals', 'courts and tribunals', 'international adjudication' and 'international dispute settlement' are used interchangeably.[42]

C. Chinkin, *Third parties in international law*, Oxford 1993, pp. 218-220; D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 American Journal of International Law (1994), pp. 629-630; J. Almqvist, supra note 33, p. 278. See L. Brown/F. Jacobs, *The Court of Justice of the European Communities* 3rd Ed., London 1989, p. 55. This assessment overinflates *amicus curiae*. Unlike the Advocates General, *amici curiae* do not possess rights of participation in the proceedings.

41 Article 4 UNCITRAL Rules on Transparency; Articles 10, 17(4) DSU. See L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*, London 2005, p. 170 ('Parties not bound by the particular arbitration agreement and affected by the particular arbitration are referred to as third parties.').

42 On the differentiation between court and tribunal, see Y. Shany, *The competing jurisdictions of international courts and tribunals*, Oxford 2003, pp. 12-13, FN 44.

Part I
The ‘international’ *amicus curiae*

Chapter § 2 Great expectations? Presumed functions and drawbacks of *amicus curiae* participation

Before embarking on an analysis of the content and legal ramifications of *amicus curiae*, it is worthwhile to consider the justifications underlying its reception in international adjudication, that is, its presumed functions and the associated drawbacks. These considerations will serve as the measuring scale for the effectiveness and added value of *amicus curiae* participation in international dispute settlement throughout this book.

This Chapter will first outline the functions attributed to *amicus curiae* before international courts and tribunals (A.) and then address the feared drawbacks (B.).

A. Presumed functions of amicus curiae

Academic writers and international stakeholders attribute different functions to the international *amicus curiae.* Mainly they are that *amicus curiae* increases the information available to international courts and tribunals (I.); that *amicus curiae* is a medium through which international courts and tribunals are made aware of the public's view in a case and the public interests at stake (II.); that *amicus curiae* increases the legitimacy of international courts and tribunals, as well as contributes to overcoming a democratic deficit in international adjudication (III.); that *amicus curiae* increases the transparency of international adjudication (IV.); and that *amicus curiae* helps to secure the coherence of international law (V.).

I. Broader access to information

Concepts such as *iura novit curia* and – in some courts – an obligation to establish the objective facts of the case require judges to obtain a complete picture of events and the relevant laws and arguments.[1] Proponents of *am-*

1 The latter obligation is not universal. See for many, S. Schill, *Crafting the international economic order: the public function of investment treaty arbitration and its*

icus curiae participation argue that the assistance from *amicus curiae* can support a court in this endeavour and help it to produce decisions of higher quality.[2] *Amici curiae* can soothe the imperfections of the bilateral structure of dispute settlement. Especially where the parties are unwilling or unable to provide the necessary information, where a judge faces a novel legal issue or one that lies outside his area of specialisation or where the caseload makes it impossible for judges and their clerks to conduct extensive legal research, *amici curiae* can provide the requisite information.[3] The CIEL commented on the advantages of *amicus curiae* participation

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significance for the role of the arbitrator, 23 Leiden Journal of International Law (2010), pp. 422-423.

2 See L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 244, 249; O. Bennaim-Selvi, *Third parties in international investment arbitrations: a trend in motion*, 6 Journal of World Investment and Trade (2005), p. 786; S. Schill, supra note 1, p. 424 (Fact-finding *proprio motu* should be restricted to special circumstances where the interests of non-participating parties are involved, such as issues of corruption). See also P. Carozza, *Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights*, 73 Notre Dame Law Review (1998), p. 1225. *Carozza* contends that the ECtHR does not conduct proper comparative analysis of legal issues, in particular, that it selects the cases it considers arbitrarily. *Amicus curiae* could alleviate this concern.

3 With regard to WTO law, see R. Howse et al*., Written submission of non-party amici curiae in EC-Seals*, 11 February 2013, para. 13 ('The preliminary submissions in this brief are aimed at correcting the misleading and incomplete manner in which Canada has characterized the objectives of the measures at issue in this dispute...'); C. Beharry/M. Kuritzky, *Going green: managing the environment through international investment arbitration*, 30 American University International Law Review (2015), pp. 415-416 ('While interested third parties could always petition the parties to the dispute with their expertise or knowledge, allowing an independent party to provide expertise in a separate process is valuable because it prevents disputing parties from acting as gatekeepers of specialized knowledge.'); G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), p. 783; D. Steger, *Amicus curiae: participant or friend? – The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international co-ordination – studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 419, 447. In the case of corruption or bribery, the parties may try to keep certain information from the court or tribunal. See also *AES v. Hungary* where, according to *Levine*, 'neither Hungary nor the investor would have an interest in emphasizing the fact that the contracts between them may violate the European Commission's restrictions on state aid. The

for the furtherance of the law in respect of cases concerning the Aliens Claims Tort Act before the US Federal Courts:

> *[A]micus curiae* briefs are useful when trying to set new legal precedents enforcing innovative legal concepts, such as environmental rights. Persons or organizations who submit *amicus curiae* briefs can advocate for more novel principles and interpretations of law than the lawyers who directly represent a client in the case are likely to be free to do, given that they must zealously advocate for their client and, as such, will probably feel obliged to argue that the case involves violations of established legal principles with precedent judges can rely on in making their decisions.[4]

In short, *amici curiae* can extend an international court or tribunal's access to relevant information. The term information in this respect is used loosely and collectively to cover both the (legal) arguments a court must apply and consider in the interpretation of the applicable laws, as well as the facts of the case and the relevant context. The idea is that 'the greater the amount of information and views considered, the greater the chances for a good outcome.'[5]

It is particularly important that the decisions of international courts and tribunals are free from error given the significant impact of decisions and their general finality.[6] In *Methanex v. USA*, an *amicus curiae* petitioner, who sought to argue that the interpretation of NAFTA's Chapter 11 should

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claimant would certainly not wish to emphasize that a contract may be based on an illegality, as this may impact their ability to claim damages. As for Hungary, the state may consider it detrimental to emphasize this issue as its primary defence, since its acknowledgment of engaging in state aid may give rise to further actions by the Commission within the EU sphere.' E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 Berkeley Journal of International Law (2011), p. 217 [References omitted]. For the award, see *AES Summit Generation Limited and AES-Tisza Erömü Kft. (UK) v. Republic of Hungary* (hereinafter: *AES v. Hungary*), Award, 23 September 2010, ICSID Case No. ARB/07/22.

4 J. Cassel, *Enforcing environmental human rights: selected strategies of U.S. NGOs*, 6 Northwestern Journal of International Human Rights (2007), p. 122 [references omitted].

5 G. Umbricht, supra note 3, p. 774; M. Schachter, *The utility of pro bono representation of U.S.-based amicus curiae in non-U.S. and multi-national courts as a means of advancing the public interest*, 28 Fordham International Law Journal (2004), p. 111 ('[T]he facilitation of an informed, deliberative, and fair-minded court ruling is among the most laudable purposes of an *amicus* submission.').

6 There is a limited review of panel decisions by the WTO Appellate Body under Article 17 of the DSU, and Articles 51 and 52 of the ICSID Convention allow revision

include legal principles relating to sustainable development, submitted that he would contribute to the avoidance of error by providing a 'fresh and relevant perspective' on some of the issues before the tribunal.[7]

Has this function lost some of its relevance lately? Given the ready (online) availability of legal materials, judges are no longer confined to the legal literature available in the court library. In addition, many judges now have clerks to assist them with legal research.[8] Moreover, with the help of new media they can more easily than ever carry out basic fact-checks (to the extent that this is in accordance with the applicable rules). Still, it appears premature to argue that this change obviates information-based *amicus curiae.* While it remains to be examined what has been the impact of the new technologies on information-based *amici curiae*, there seems to be room left for it. Admittedly, the pure transmission of information today is less relevant than a decade ago, but this function may be useful with respect to facts and specialized legal information Above all, *amici curiae* can assist judges in navigating the vast amount of material available on an issue.[9] In this respect, *amici curiae* have shifted from mere (descriptive) providers to pre-screeners of information. This shift is not unproblematic. There is a risk of incomplete and distortive submissions. Nevertheless, these *amici curiae* can reopen the marketplace of ideas before the court. They can highlight or elaborate arguments or facts that the parties have not exhaustively discussed. This may be particularly relevant before courts that form part of specialized subsystems of international law with a clear

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and annulment of awards, if a narrow set of requirements are met. Regarding the effects of erroneous judicial decisions, see M. Reisman, *Nullity and revision: the review and enforcement of international judgments and awards*, New Haven 1971; J. Pauwelyn, *The use of experts in WTO dispute settlement*, 51 International and Comparative Law Quarterly (2002), p. 353 ('The risk of a panel 'getting it wrong', because the parties did not present certain information, has consequences that may affect millions of people'.).

7 *Methanex v. USA*, Decision of the Tribunal on petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, para. 6.

8 But see with regard to the ACtHPR F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 Journal of African Law (2014), p. 37 ('*Amicus* briefs also enable the court to access legal opinion and practical information that a resource and time-constrained court would not otherwise obtain. Without the support of experts and NGOs, the role of the court will be marginal at best.').

9 J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, p. 115.

policy mandate in favour of a certain interest.[10] In this regard, *amici* can infuse the deliberations with new views, fortify solid competition and exchange of legal ideas, as well as give guidance on new laws or legal issues outside the judges' core fields of expertise.[11]

II. Representation of 'the' public interest

A second function often presumed is that *amicus curiae* participation allows the representation of public or community interests by civil society. *Amicus curiae* is portrayed as an instrument that complements the 'voluntarist and bilateral origins of international law' with public interest-based normative structures.[12] *Barker* notes the specific ability of fact-focused *amici curiae* to support 'rational decision making, especially when judges are faced with issues having broad political-social ramifications.'[13]

One justification for the involvement of civil society is that international courts routinely assess the conformity with international law of states' conduct and actions adopted under national law, including 'measures of general application intended to promote or achieve important public policy goals [or values]' which concern areas traditionally considered belonging to the sovereign prerogative of nation states.[14] Especially in investment ar-

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10 R. Howse, *Membership and its privileges: the WTO, civil society, and the amicus brief controversy*, 9 European Journal of International Law (2003), p. 502; N. Trocker, *L'"Amicus Curiae" nel giudizio devanti alla Corte Europea dei Diritti Dell'Uomo*, 35 Revista di Diritto Civile (1989), p. 124; S. Joseph, *Democratic deficit, participation and the WTO*, in: S. Joseph/D. Kinley/J. Waincymer (Eds.), *The World Trade Organization and human rights*, Cheltenham and Northampton 2009, p. 316.

11 L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 Journal of World Investment and Trade (2004), p.335.

12 M. Benzing, *Community interests in the procedure of international courts and tribunals*, 5 The Law and Practice of International Courts and Tribunals (2006), p. 371.

13 L. Barker, *Third parties in litigation: a systematic view of the judicial function*, 29 The Journal of Politics (1967), p. 54.

14 K. Kinyua, *Assessing the benefits of accepting amicus curiae briefs in investor-state arbitrations: a developing country's perspective*, Stellenbosch University Faculty of Law, Working Paper Series No. 4 (2009), quoted by E. Levine, supra note 3, p. 200; P. Wieland, *Why the amicus curiae institution is ill-suited to address indigenous peoples' rights before investor-state arbitration tribunals:*

bitration and in WTO dispute settlement, subsystems focused on trade and investment respectively, an increasing number of disputes concern the legality of state measures (including parliamentary acts) seeking to protect public commodities or rights, such as the environment, human rights, water management and public health.[15] The matter has become pressing also for Western countries as they increasingly risk incurring state responsibility for measures carried out in the interest and will of their constituents. In *Methanex v. USA*, one of the *amicus* petitioners argued that the tribunal's decision would have a 'critical impact … on environmental law and other public welfare law-making in the NAFTA region.'[16] Exemplary recent cases include the legality of the EU's ban on the import and marketing of seal and seal products for reasons of public morale which was challenged by Canada under the WTO Agreement, proceedings brought against the Kingdom of Spain for reducing subsidies in the renewable energies sector following the world financial crisis and proceedings against El Salvador for breach of the CAFTA by the mining company Pac Rim Cayman LLC following the refusal of environmental permits required by El Salvadorian

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Glamis Gold and the right of intervention, 3 Trade, Law and Development (2011), p. 338.

15 Investment agreements in their preambles establish as objectives the furtherance of free trade and foreign investment, including effectiveness of any dispute resolution mechanism. Cf. Article 102 NAFTA. See also G. Carvajal Isunza/F. Gonzalez Rojas, *Evidentiary issues on NAFTA Chapter 11 arbitration: searching for the truth between states and investors*, in: T. Weiler (Ed.), *NAFTA investment law and arbitration*, New York 2004, p. 287. For the claim that investment treaty arbitration can be viewed as a system, see S. Schill, *The multilateralization of international investment law*, Cambridge 2009; C. Brower, *Obstacles and pathways to consideration of the public interest in investment treaty disputes*, in: K. Sauvant (Ed.), *Yearbook on international investment law & policy*, Oxford 2008-2009, p. 351. See also the growing literature seeking to accommodate the competing interests within the subsystems. For many, G. Marceau, *WTO dispute settlement and human rights,* 13 European Journal of International Law (2002), p. 753; J. Viñuales, supra note 9. Arguing against the perception of investor-state dispute settlement as a public system and for a characterization as a hybrid public private system, see J. Alvarez, *Is investor-state arbitration "public"?*, 7 Journal of International Dispute Settlement (2016), pp. 534–576.

16 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, para. 5 (The *amicus* applicant submitted that the case was also of constitutional importance, thus, raised national public interests.).

law for the extraction and exploitation of gold out of a concern over the pollution of one of the country's most important rivers.[17]

Furthermore, international legal norms tend to be rather abstract having been achieved by inter-state negotiation and compromise. Courts and tribunals must concretize obligations and balance competing interests by way of treaty interpretation, at times to an extent usually reserved for the legislature.[18] Given this reality, international decisions have an important quasi-precedential value.[19]

Moreover, there is an issue of costs: the general public and local communities will ultimately bear (at least the state's share of) the costs of the proceedings and potential damages, as well as may be the recipients of new legislation or executive action.[20]

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17 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (hereinafter: *EC–Seal Products*), Report of the Panel, adopted on 18 June 2014, WT/DS400/R, WT/DS401/R; C. Patrizia/J. Profaizer/I. Timofeyev, *Investment disputes involving the renewable energy industry under the Energy Charter Treaty*, 2 October 2015, GAR, at: http://globalarbitrationreview.com/chapter/1036076/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty (last visited: 28.9.2017); *Pac Rim Cayman LLC v. Republic of El Salvador* (hereinafter: *Pac Rim v. El Salvador*), Notice of Arbitration, 30 September 2009, ICSID Case No. ARB/09/12.

18 C. Brower, supra note 15, pp. 355-356; G. Van Harten, *Investment treaty arbitration and public law,* Oxford 2007, p. 122; C. Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 Journal of International Economic Law (2003), p. 699; V. Lowe, *The function of litigation in international society*, 61 International and Comparative Law Quarterly (2012), p. 214; R. Howse, *Adjudicative legitimacy and treaty interpretation in international trade law: the early years of WTO jurisprudence*, in: J. Weiler (Ed.), *The EU, the WTO and the NAFTA*, Oxford 2000, p. 39. On the problems associated with the applicability of public interest measures in investment treaty arbitration see A. Kulick, *Global public interest in investment treaty arbitration*, Cambridge 2012, pp. 50-52; S. Schill, *International investment law and comparative public law – an introduction*, in: S. Schill (Ed.), *International investment law and comparative public law*, Oxford 2010, pp. 6-7.

19 Interpretations rendered in investment arbitrations have influenced not only the decision-making in following disputes, but they have also influenced treaty-making. S. Schill, supra note 1, pp. 415-418.

20 In the context of the ECtHR, *amicus curiae* participation has been justified on the ground that a judgment may have an effect on the rights and obligations of everyone within the respondent state's jurisdiction. See A. Lester, *Amici curiae: third-party interventions before the European Court of Human Rights*, in: F. Matscher/H. Petzold (Eds.), *Protecting human rights: the European dimension – studies in honour of Gérard J. Wiarda*, Cologne 1988, p. 342. *Franck* calculated

Also, it is argued that there is a growing number of global interests whose representation cannot (or should not) be left to individual states. In these cases, *amici curiae* shall act as a link between the court and the public by (re)presenting the broader issues affected by the case.[21] In *Biwater v. Tanzania*, *amicus curiae* petitioners submitted that because the arbitration substantially influenced the 'population's ability to enjoy basic human rights … the process should be transparent and permit citizens' participation. In particular, the Arbitral Tribunal should hear from the leading civil society groups in Tanzania on these issues.'[22]

For these reasons, it is said that 'where the award can have deep impacts on such issues of general interest, it would be outrageous for the tribunal to bluntly ignore any offer of assistance made by third parties claiming to voice the interest of the public.'[23] The claim is that the affected public should be given a procedural tool to present its viewpoints in proceedings involving matters of public interest. Otherwise, the international court or tribunal may risk its legitimacy.[24] This departure from the doctrine of espousal rests on the belief that the state will (or cannot) represent the

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that the average amount of damages claimed in investment arbitration was about USD 343.4 million. See S. Franck, *Empirically evaluating claims about investment arbitration*, 86 North Carolina Law Review (2007), p. 58. G. Van Harten, supra note 18, p. 1 (The investment claims brought against Argentina in the aftermath of its financial crisis exceeded its financial reserves); F. Marshall/H. Mann, IISD, *Revision of the UNCITRAL Arbitration Rules: good governance and the rule of law: express rules for investor-state arbitrations required*, September 2006, p. 3, at: http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf (last visited: 28.9.2017); R. Higgins, *International law in a changing international system*, 58 Cambridge Law Journal (1999), p. 84.

21 L. Barker, supra note 13, p. 56.

22 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (hereinafter: *Biwater v. Tanzania*), Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 14.

23 A. Mourre, *Are amici curiae the proper response to the public's concerns on transparency in investment arbitration?*, 5 The Law and Practice of International Courts and Tribunals (2006), p. 266; M. Gruner, *Accounting for the public interest in international arbitration*, 41 Columbia Journal of Transnational Law (2003), p. 955; K. Hobér, *Arbitration involving states*, in: L. Newman/R. Hill (Eds.), *The leading arbitrators' guide to international arbitration*, New York 2008, Chapter 8, p. 155.

24 CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 2; C. Brower, supra note 15, p. 347 ('[N]o legal regime can maintain legitimacy while ignoring the fundamental needs and values

public interest adequately (or as preferred by the *amicus curiae* applicant), because its primary goal is to win the case.[25] *Amicus curiae* briefs are 'expected to reduce adverse effects of [the parties' arbitration strategies] on the public good of the host State.'[26] The matter is of particular concern in the WTO where critics stress an additional readiness on the part of states to defend the interests of the industry sector at the expense of public interests and values.[27]

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of affected populations.'); E. Triantafilou, *Is a connection to the "public interest" a meaningful prerequisite of third party participation in investment arbitration?*, 5 Berkeley Journal of International Law (2010), p. 38.

25 For many, G. Umbricht, supra note 3, p. 783 ('The fair representation by governments of every minority forming part of their constituency is a fiction.'); O. De Schutter*, Sur l'émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l'homme*, 7 European Journal of International Law (1996), p. 407; D. McRae, *What is the future of WTO dispute settlement?*, 7 Journal of International Economic Law (2004), p. 11; D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 American Journal of International Law (1994), p. 615 (Reasons why a party may not present an interest adequately include: limited relevance, difficulties in obtaining evidence, lack of resources, litigation strategy, de-politicization of a dispute.); A. Kawharu, *Participation of non-governmental organizations in investment arbitration as amici curiae*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 284 (A state may try to avoid being perceived as anti-investor); R. McCorquodale, *An inclusive international legal system*, 17 Leiden Journal of International Law (2004), pp. 477-504; A. Reinisch, *The changing international legal framework for dealing with non-state actors*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, pp. 74-78.

26 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), p. 398; A. Bianchi, *Introduction*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, p. xxii.

27 R. Reusch, *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Berlin 2007, pp. 228-232. In US and EU law, private parties can force their governments or the EC to initiate WTO dispute settlement proceedings respectively. Further, private companies can influence national decision-makers informally. See B. Jansen, *Die Rolle der Privatwirtschaft im Streitschlichtungsverfahren der WTO*, 3 Zeitschrift für europarechtliche Studien (2000), pp. 293-305; J. Dunoff, *The misguided debate over NGO participation at the WTO*, 4 Journal of International Economic Law (1998), pp. 435-436, 441-448 ('[B]oth Kodak and Fuji had input into virtually every stage of WTO processes, including the initial consultations, the selection of panellists, the written submissions, the oral representations and the written responses to the panel's questions. In addition to these informal roles in these formal processes, Kodak and Fuji also attempted to shape the larger political context

Related hereto is the argument that, because at least factually proceedings before international courts extend beyond the parties appearing before them, international courts and tribunals do not only offer a private service to the parties, but execute a broader, public function.[28] Therefore, proceedings should be inclusive.

An issue that requires analysis throughout this contribution is what is the public interest justifying a broadening of the judicial function. The term public interest appears frequently in relation to *amici curiae*, in particular in investor-state arbitration, but it is rarely defined and remains vague. How do we define the public interest? Does it refer to the national interest based on which a certain measure was issued or should it be a general and internationally accepted interest? Are they the same? Can one speak of an international public at all, especially in the investment con-

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within which the WTO dispute resolution proceedings occurred.'); S. Charnovitz, *Participation of nongovernmental organizations in the World Trade Organization*, 17 University of Pennsylvania Journal of International Economic Law (1996), p. 351, FN 99 (He quotes a 1994 speech by then US-Trade Representative *Kantor*, who characterized the GATT panel process as 'star chamber proceedings that are making the most important decisions that affect the lives of all our citizens – especially in the environmental area – and there is no accountability whatsoever.' See M. Kantor, *Remarks on trade and environment at the global legislators' organisation for a balanced environment* on 28 February 1994. The US Congress responded by directing him to seek greater transparency at all WTO levels); A. Schneider, *Democracy and dispute resolution: individual rights in international trade organizations*, 19 University of Pennsylvania Journal of International Economic Law (1998), pp. 587, 594; J. Morison/G. Anthony, *The place of public interest*, in: G. Anthony et al (Eds.), *Values in global administrative law*, Oxford 2011, pp. 217, 229. Critical, M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, 5 World Trade Review (2006), p. 98.

28 R. Higgins, supra note 20, p. 95 ('International law is a facilitating discipline – its purpose is to assist in the achievement of an international stability that is consistent with justice and in the realisation of shared values.'); C. Brower, supra note 15, pp. 423-424 ('Arbitrators in investment treaty cases not only fulfil a function in settling the specific dispute at hand, but also are agents of the international community.'); S. Schill, supra note 1, p. 419; C. Tams/C. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45 Archiv des Völkerrechts (2007), p. 223; G. Van Harten/M. Loughlin, *Investment treaty arbitration as a species of global administrative law*, 17 European Journal of International Law (2006), pp. 145-148. See, however, G. Aguilar Alvarez/W. Park, *The new face of investment arbitration: NAFTA Chapter 11*, 28 Yale Journal of International Law (2003), p. 394.

text?[29] One could argue that all cases involving state participation – thus, every 'international court case' – raises a public interest for they engage the state budget and concern the legality of the exercise of state authority. For the present purpose, this contribution views as pertaining to the public interest all those matters that extend beyond the mere parties to the dispute and affect an abstract local, national, or global constituency.[30] This admittedly broad concept allows for the inclusion of public national and international interests.

III. Legitimacy and democratization

With the growing number of disputes before an increasing number of international courts and tribunals since the early 1990, concerns have arisen over the legitimacy and democracy of international judicial decision-making. While this issue concerns all international courts and tribunals, it is

29 For a consideration of the international community and community values, see A. Paulus, *Die internationale Gemeinschaft im Völkerrecht*, Munich 2001; V. Lowe, *Private disputes and the public interest in international law*, in: D. French et al. (Eds.), *International law and dispute settlement: new problems and techniques – liber amicorum John G. Merrills*, Oxford 2010, p. 9 ('[W]hat kinds of public interest are appropriate to be put before international tribunals, and who should decide that question? Who should be permitted to make representations in the public interest? Elected local councils? State agencies, such as environmental agencies established by the government of a State? International scientific bodies? Organisations with an explicit political agenda, such as Greenpeace or Amnesty International? You? Me? The Church of Scientology? And again, who decides?'); L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*, London 2005, p. 230.

30 M. Gruner, supra note 23, pp. 929-932 (It is a 'set of values and norms that serve as ends towards which a community strives.'). M. Benzing, supra note 12, p. 371 ('Community interests … are those which transcend the interests of individual states and protect public goods of the international community as a whole or a group of states.' [References omitted].). A private interest is understood as any interest that belongs to one person or a defined group of persons. See also Chapter 4.

discussed in particular in respect of the compulsory WTO dispute settlement system and investor-state arbitration.[31]

The literature on this issue is vast and continues to expand ranging from highly theoretical considerations to more practical accounts.[32] Matters are made more complex by diverging conceptions of legitimacy, a shift from consent-based to governance-based concepts of international law and the confluence of concerns over the political legitimacy of international subsystems with that of their (quasi-)judicial organs. This contribution only addresses concerns pertaining to adjudicatory legitimacy.[33]

On a basic level, legitimacy is seen as the justification for the exercise of public authority.[34] As a binding decision based on law by a third over a

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31 Regarding the WTO, see R. Reusch, supra note 27, pp. 40-124. ICSID awards can be enforced as judgments of the highest court at the place of enforcement, Article 54(1) ICSID Convention.

32 S. Schill, supra note 1, p. 6, FN 8 (Signs of the legitimacy crisis in investment arbitration are seen in the withdrawal of several Latin American states such as Bolivia and Venezuela from investment treaties and the ICSID Convention); A. Van Duzer, *Enhancing the procedural legitimacy of investor-state arbitration through transparency and amicus curiae participation*, 52 McGill Law Journal (2007), pp. 681-723; C. Forcese, *Does the sky fall? NAFTA Chapter 11 dispute settlement and democratic accountability*, 14 Michigan State Journal of International Law (2006), p. 315; S. Joseph, supra note 10, pp. 316-319. T. Ishikawa, supra note 26, p. 399; C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 137; D. Prévost, *WTO Subsidies Agreement and privatised companies: Appellate Body amicus curiae briefs*, 27 Legal Issues of Economic Integration (2000), p. 287. The criticism of closed dispute-settlement proceedings relates to a larger debate on the lack of public participation in all areas of WTO activity, see R. Housman, *Symposium: democratizing international trade decision-making*, 27 Cornell International Law Journal (1994), pp. 699-747.

33 But see also A. von Bogdandy/I. Venzke, *In whose name? An investigation of international courts' public authority and its democratic justification*, 23 European Journal of International Law (2012), pp. 7-41; With respect to the political legitimacy of subsystems, see R. Reusch, supra note 27; R. Howse, supra note 10, pp. 496-497.

34 R. Wolfrum, *Legitimacy of international law from a legal perspective: some introductory considerations*, in: R. Wolfrum/V. Röben (Eds.), *Legitimacy in international law*, Berlin 2008, p. 6; A. Voßkuhle/G. Sydow, *Die demokratische Legitimation des Richters*, 57 Juristische Zeitung (2002), pp. 673-682. For this and other, including positivist definitions of legitimacy, see R. Reusch, supra note 27, pp. 35-36; H. Kelsen, *Principles of international law*, New York 1952.

(disputed) fact pattern, adjudication squarely falls within this category.[35] The legitimacy of adjudication is generally seen to depend on two pillars: the selection of an impartial, independent and knowledgeable adjudicator and the creation of an adequate procedure that permits participation of all those affected by a decision. In international law, in addition, traditionally legitimacy stems from a state's voluntary submission to a court's jurisdiction as expressed by the principle of consent.[36] If duly exercised, these pillars secure a final rational decision that is accepted by those addressed and affected by it.[37]

Legitimacy considerations with respect to *amicus curiae* address procedural and substantive legitimacy. Procedural legitimacy (or input legitimacy) demands that judges decide on the basis of the applicable law, give the parties adequate opportunity to argue their case, respect basic considerations of due process and fair trial and give those affected by a decision the opportunity to participate.[38] Substantive (or output) legitimacy relates to the quality of the decision rendered by an international court or tribunal.

The argument for a procedural legitimacy deficit builds on the same structure as the argument for representation of the public interest: international courts are increasingly called upon to determine the legality with international law of domestic regulatory measures on issues of general public interest in a binding and final manner.[39] Related hereto is the concern that these decisions often directly or indirectly affect entities without

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35 A. Voßkuhle/G. Sydow, supra note 34, pp. 674-675. On why the WTO dispute settlement system falls hereunder even though the DSB adopts the reports, see R. Reusch, supra note 27, pp. 61, 123-124.

36 R. Reusch, supra note 27, pp. 202-236.

37 D. Esty, *We the people: civil society and the World Trade Organization*, in: M. Bronckers/R. Quick (Eds.), *New directions in international economic law – essays in honour of John H. Jackson*, The Hague 2000, p. 92 ('The ongoing legitimacy of the WTO depends on the public perception that its decisions are based on sound logic, not whim or special interest pressures.'); G. Van Harten, supra note 18, p. 159.

38 R. Reusch, supra note 27, pp. 202-236; R. Wolfrum, supra note 34, p. 6; R. Howse, supra note 18, p. 42 (*Howse* argues that at a minimum level it suffices to establish publicity so that those affected can understand how they are affected and on what basis the outcome was achieved.); M. Slotboom, supra note 27, p. 99. See also N. Luhmann, *Legitimation durch Verfahren*, 2nd Ed., Frankfurt a.M. 1989.

39 R. Wolfrum, supra note 34, p. 6; A. von Bogdandy/I. Venzke, supra note 33, p. 31; B. Choudhury, *Recapturing public power: is investment arbitration's engagement of the public interest contributing to the democratic deficit?*, 41 Vanderbilt Journal

standing, hence, without the ability to defend their position in court.[40] Both *Rosenne* and *Brownlie* have called for a formal right of individuals to be heard in cases affecting their legal rights before the ICJ.[41]

There is an additional layer of concerns connected to the legitimacy of the adjudicators as the following statement by *Choudry* concerning investment arbitration shows:

> Public interest regulations are promulgated by elected officials to protect the welfare of the state's citizens and nationals. Thus, interference with these regulations by unelected and unappointed arbitrators is not consistent with basic principles of democracy. … [C]orrecting the democratic deficit … involves concepts of legitimacy, which requires the inclusion of core democratic values in the investment arbitration process. Thus, public participation in the decision-making process should be encouraged on the part of stakeholders whose interests may not be adequately represented by a member state.[42]

The view is that because adjudicators are so far removed from those they ultimately adjudicate upon (under novel concepts: individuals) and states increasingly transfer powers to international organizations (and thus potentially to international adjudication), international judges' democratic le-

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of Transnational Law (2008), p. 775; E. Levine, supra note 3, p. 205; T. Ishikawa, supra note 26, p. 399; J. Dunoff, supra note 27, pp. 733, 758 (A general contention is that WTO rules unduly restrict the regulatory capacities of states, which is particularly problematic if they affect the ability of states to enact laws that reflect the democratic will of their people); S. Joseph, supra note 10, p. 314; D. McRae, supra note 25, p. 21.

40 A. von Bogdandy/I. Venzke, supra note 33, p. 36.

41 S. Rosenne, *Reflections on the position of the individual in inter-state litigation*, in: P. Sanders (Ed.), *International arbitration – liber amicorum for Martin Domke*, The Hague 1967, reprinted in: S. Rosenne, *An international law miscellany*, Dordrecht 1993, p. 123; I. Brownlie, *The individual before tribunals exercising international justice*, 11 International and Comparative Law Quarterly (1962), p. 716 ('Even if the individual is not to be given procedural capacity a tribunal interested in doing justice effectively must have proper access to the views of individuals whose interests are directly affected whether or not they are parties as a matter of procedure.' [References omitted]).

42 B. Choudhury, supra note 39, p. 782 and 807-808 [References omitted]. See also J. Atik, *Legitimacy, transparency and NGO participation in the NAFTA Chapter 11 process*, in: T. Weiler (Ed.), *NAFTA investment law and arbitration: past issues, current practice, future prospects*, New York 2004, pp. 136, 138; C. Tams/C. Zoellner, supra note 28, p. 225; D. Esty, supra note 37, p. 90; M. Laidhold, *Private party access to the WTO: do recent developments in international trade dispute resolution really give private organizations a voice in the WTO?*, 12 The Transnational Lawyer (1999), pp. 432-433.

gitimization, which is exercised through national election processes, is too remote to justify the exercise of authority without additional mechanisms of civic participation. Lack of broad public support, it is argued, may compromise the validity and the legitimacy of decisions.[43]

Amicus curiae participation is said to improve the acceptance and credibility of proceedings by guaranteeing public input and the adequate presentation of all of the interests involved.[44] By inviting *amici curiae* with a stake in one of the (unrepresented) issues to partake in disputes where global values clash, international courts and tribunals can increase proce-

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43 D. Esty, supra note 37, p. 89; R. Reusch, supra note 27, pp. 126-127. R. Howse, *How to begin to think about the "democratic deficit at the WTO"*, in: R. Howse (Ed.), *The WTO system: law, politics and legitimacy*, London 2007, pp. 57-75. For a definition of 'democratic values', namely inclusiveness, transparency and value pluralism, see S. Joseph, supra note 10, p. 316.

44 R. Higgins*, Remedies and the International Court of Justice: an introduction*, in: M. Evans (Ed.), *Remedies in international law*, Oxford 1998, p. 1; C. Chinkin/R. Mackenzie, supra note 32, p. 137; E. De Brabandere, *NGOs and the „public interest" – the legality and rationale of amicus curiae interventions in international economic and investment disputes*, 12 Chinese Journal of International Law (2011), pp. 85-113; C. Tams/C. Zoellner, supra note 28, p. 238; T. Zwart, *Would international courts be able to fill the accountability gap at the global level?*, in: G. Anthony et al. (Eds.), *Values in global administrative law*, Oxford 2011, p. 212. In the context of the WTO, see. G. Umbricht, supra note 3, p. 783; D. Esty, supra note 37, p. 90; R. Howse, supra note 18, p. 40 ('[E]ven from an internal perspective of effective 'regime management', there is an urgency to seek a new basis for the 'social legitimacy' of dispute settlement outcomes, a basis sensitive to the concern of critics or sceptics concerning the project of global economic liberalism that the whole undertaking of international trade law is tilted towards the privileging of free trade against other competing, relevant values of equal or greater legitimacy in themselves.'); N. Blackaby/C. Richard, *Amicus curiae: a panacea for legitimacy in investment arbitration?*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 269 ('Considering that public participation is at the heart of democratic processes, it is assumed that increased civil society participation will enhance the legitimacy and acceptance of the system.' [References omitted]. The basis of this argument is fragile. It presumes that the specific *amicus curiae* fulfils the requirements of a legitimate representative of public interests (see also Chapters 5 and 8)); A. von Bogdandy/I. Venzke, supra note 33, p. 29 ('[*Amici curiae*] may bridge the gap between the legal procedures and a global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalization that contribute to discussions and mobilize the general public.').

dural legitimacy.[45] *Crawford* and *Marks* see 'the vastly enhanced participation in recent years of non-governmental organizations at the international level [as] one indication of the pressures and possibilities for democracy in global decision-making.'[46] Similarly, then-WTO Director-General *Lamy* considered the admission of *amici curiae* a recognition of the importance of the views of civil society in WTO adjudication.[47] A group of Tanzanian and international NGOs argued as follows in their request to be admitted as *amici curiae* in *Biwater v. Tanzania*:

> Finally, the petitioners emphasise the importance of public access to the arbitration from the perspective of the credibility of the arbitration process itself in the eyes of the public, which often considers investor-state arbitration as a system unfolding in a secret environment that is anathema in a democratic context.[48]

Further, the instrument is seen as a link between international courts and the individual.[49] The argument is that *amicus curiae* participation will inform the wider public of ongoing proceedings that may have a significant impact on the economy of their state and important public interests and, in

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45 L. Boisson de Chazournes, supra note 11, pp. 333-336; F. Orrego Vicuña, *International dispute settlement in an evolving global society: constitutionalization, accessibility, privatization*, Cambridge 2004, p. 29.

46 J. Crawford/S. Marks, *The global democracy deficit: an essay on international law and its limits*, in: D. Archibugi/D. Held/M. Köhler (Eds.), *Re-imagining political community*, Stanford 1998, p. 83. See also S. Joseph, supra note 10, pp. 316, 327; R. Howse, supra note 43, pp. 57-75.

47 P. Lamy, *Towards global governance? Speech of 21 October 2005*, Master of Public Affairs Inaugural Lecture at the Institut d'Etudes Politiques de Paris, at: https://www.wto.org/english/news_e/sppl_e/sppl12_e.htm (last visited: 28.9.2017).

48 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 24. See also D. Esty, supra note 37, p. 93 (He goes further by requesting that NGOs should be granted permission to observe the parties' presentations to panels, as well as obtain immediate access to all written submissions.)

49 Three days after the panel's decision in *US–Shrimp* that it lacked power to accept *amicus curiae* briefs, then-US President *Bill Clinton* endorsed *amicus* participation in the WTO dispute settlement system: 'Today, there is no mechanism for private citizens to provide input in these trade disputes. I propose that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file '*amicus briefs*,' to help inform the panels in their deliberations.' Statement by H.E. Mr. William J. Clinton in Geneva on the Occasion of the 50th Anniversary of GATT/WTO, 18 May 1998, para. 108.

return, that *amici* will report the public's views back to the tribunal.[50] This may contribute to repealing notions of 'secret trade courts' that may force governments in the long run to seek other dispute resolution mechanisms. The admission of *amicus curiae* is presented as *sine qua non* for the continued existence of international judicial dispute settlement.

The substantive legitimacy of a decision is said to be enhanced by taking these arguments seriously and thereby rendering a more informed decision of better quality and free from error.

In short, *amicus curiae* is seen to improve adjudicatory legitimacy in the following ways: first, as an instrument to ensure procedural legitimacy by allowing those affected by a decision to become involved in the proceedings and as a tool to increase the public acceptance of international dispute settlement; second, as an instrument to increase the substantive legitimacy of a decision by providing the tribunal with all information necessary to render a fully-informed decision.

IV. Contribution to the coherence of international law

International law enjoys generally low levels of coherence because of its lack of a central legislature and its inter-subjective character. Often, courts

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50 E. Triantafilou, *Amicus submissions in investor state arbitration after Suez v. Argentina*, 24 Arbitration International (2008), p. 575 ('[A] transparent arbitral process allows citizens to monitor actively the conscientiousness of the government's representatives in protecting the rights of the public and ensuring the sound disbursement of public money.'); M. Brus, *Third party dispute settlement in an interdependent world: developing a theoretical framework*, Dordrecht 1995, pp. 229-230 ('Involvement of non-state actors is particularly suitable for the upgrading of the community interest through participation in informal decision-making. Their expertise, creativity and critical attitude is an incentive for states not to lose sight of the common interest.'). According to a study on NGO involvement in international law, NGO participation may promote legitimacy by way of monitoring the process and communicating its results to the relevant constituencies and by acting as a channel of information between decision makers and constituencies. See S. Charnovitz, *Nongovernmental organizations and international law*, 100 American Journal of International Law (2006), pp. 348-372. This view has found some reflection in environmental treaties. See *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/Conf.151/5/rev (1992); *Agenda 21*, UNCED, Annex II, UN Doc. A/CONF151/26/Rev (1992).

are given the role of 'agents of legal unity.'[51] The significant growth in number of international courts and tribunals since the early 1990 has raised concerns over an increasing fragmentation of international law in the absence of formal precedent and the lack of a coordinating judicial system.[52] Concerns are amplified by the fact that many courts form part of powerful subsystems of international law with potentially competing values.[53] The phenomenon as such has been analysed in depth elsewhere.[54] Of relevance for this contribution is the concern that different international

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51 Y. Shany, *The competing jurisdictions of international courts and tribunals*, Oxford 2003, p. 114.

52 Rejecting the notion of an international judicial system, Y. Shany, supra note 51, pp. 104-110.

53 See Y. Shany, supra note 51, pp. 87-104, 113-114 (While we can speak of a system of international law from which no subsystem can isolate itself as a 'self-contained regime' if it wishes to fulfil its constituent's legitimate expectations and avoid being perceived as 'unduly biased towards a particular political agenda', there is no such correlating system with respect to international courts.).

54 The WTO Appellate Body in *US–Stainless Steel* found that it was obliged to follow earlier decisions due to its obligation under Article 3(2) DSU to ensure security and predictability in the WTO dispute settlement system. See *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (hereinafter: *US–Stainless Steel*), Report of the Appellate Body, adopted on 20 May 2008, WT/DS344/AB/R, p. 67, para. 160. See also *Saipem S.p.A. v. the People's Republic of Bangladesh*, Decision, 21 March 2007, ICSID Case No. ARB/05/07, para. 67 ('[The Tribunal] believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.' [References omitted]); H. Lauterpacht, *The so-called Anglo-American and continental schools of thought in international law*, 12 British Yearbook of International Law (1931), p. 53. Regarding the proliferation of international courts and tribunals, see E. Lauterpacht, *Principles of procedure in international litigation*, 345 Receuil des Cours (2009), p. 527; J. Charney, *The impact on the international legal system of the growth of international courts and tribunals*, 31 NYU Journal of International Law and Politics (1999), p. 697; C. Brown, *A common law of international adjudication*, Oxford 2007, p. 16; C. Brown, *The cross-fertilization of principles relating to procedure and remedies in the jurisprudence of international courts and tribunals*, 30 Loyola of Los Angeles International and Comparative Law Review (2008), pp. 219-220; G. Hafner, *Risks ensuing from the fragmentation of international law*, in: International Law Commission, Work of its Fifty-Second Session, UN Doc. A/55/10, para. 143; International Law Commission, *Fragmentation of international*

courts or tribunals may arrive at diverging, even opposing decisions in cases with comparable or identical fact patterns.[55] The fear is that if this were to occur regularly, international law might lose its normative force, as well as compromise the credibility, effectiveness and legitimacy of international adjudication.[56] This has prompted calls for subsystems of international law to 'evolve and be interpreted consistently with international law' and for the courts pertaining to such subsystems to strive to ensure uniform application and interpretation of international law.[57] In this vein, courts are requested to give greater weight to the pertinent case law of other international courts and tribunals despite the absence of binding precedent in international law.[58]

By providing cross-references to and analysis of the case law and views of other international courts and tribunals, *amici curiae*, it is argued, can

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law: difficulties arising from the diversification and expansion of international law, UN Doc. A/CN.4/L.682, 13 April 2006; R. Jennings, *The role of the International Court of Justice*, 68 British Yearbook of International Law (1997), p. 60; R. Higgins, *Respecting sovereign states and running a tight courtroom*, 50 International and Comparative Law Quarterly (2001), p. 122. Disputing that fragmentation is problematic, see T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvant (Ed.), Yearbook of International Investment Law and Policy (2008-2009), pp. 508-509, 516-521.

55 On these conflicts, which *Treves* calls jurisprudential conflicts, see T. Treves, *Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 NYU Journal of International Law and Politics (1999), pp. 809-821. Regarding parallel jurisdiction, see H. Sauer, *Jurisdiktionskonflikte im Mehrebenensystem: Die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen*, Berlin 2008; Y. Shany, supra note 51.

56 L. Helfer/ A. Slaughter, *Toward a theory of effective supranational adjudication*, 107 Yale Law Journal (1997), pp. 374-375; S. Franck, *The legitimacy crisis in investment arbitration: privatizing public international law through inconsistent decisions*, 73 Fordham Law Review (2005), p. 1523. According to Kelsen, the principle of non-contradiction is part of the basic norm of a legal system, H. Kelsen, *General theory of law and state*, Cambridge 1949, p. 406.

57 A. van Aaken, *Fragmentation of international law: the case of international investment protection*, 17 Finnish Yearbook International Law (2006), p. 91. See also Y. Shany, *One law to rule them all: should international courts be viewed as guardians of procedural order and legal uniformity?,* in: O. Fauchald/A. Nollkaemper (Eds.), *The practice of international courts and the (de-)fragmentation of international law*, Oxford 2012, p. 15.

58 Y. Shany, supra note 51, p. 110.

inform the deciding international court or tribunal of the legal interpretation of a norm by other international courts or tribunals, encourage inter-judicial dialogue and draw attention to potential jurisprudential conflicts.[59] This, of course, presupposes willingness on the part of international courts and tribunals to take into consideration the decisions of other international courts and tribunals given the absence of *stare decisis*.[60]

V. Increased transparency

Most international courts and tribunals provide to the public, with varying frequency and at different times, information and documents on pending and concluded cases. In particular, investment tribunals and the WTO dispute settlement institutions are criticized for lack of transparency in their proceedings and decision-making despite efforts towards greater transparency.[61]

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59 *Mackenzie* and *Chinkin* consider it an option for an international court to submit *amicus* briefs on an issue of law it has decided to a court dealing with the same issue to avoid fragmentation. See C. Chinkin/ R. Mackenzie, supra note 32, p. 159; V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 Vanderbilt Journal of Transnational Law (2015), p. 1338; Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 821 (On *amici curiae*: 'Their goal, however, is to introduce public interest considerations into the decision – and indirectly, to impact the development of international law – rather than to affect the outcome of the specific case.').

60 This does not seem to be a problem. See E. Lauterpacht, supra note 54, pp. 527-528; J. Charney, *Is international law threatened by multiple international tribunals?,* 271 Receuil des Cours (1998), pp. 101-373. See also H. Lauterpacht, *The development of international law by the International Court*, London 1958, p. 14 ('The Court follows its own decisions … , because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and … because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.'). Less hopeful, N. Rubins, *Opening the investment arbitration process: at what cost, for what benefit?*, in: R. Hofmann/C. Tams (Eds.), *The International Convention on the Settlement of International Disputes (ICSID): taking stock after 40 years*, Baden-Baden 2007, p. 217.

61 D. McRae, supra note 25, p. 12 ('Lack of transparency is a critical issue for the credibility of the WTO dispute settlement system.'); C. Knahr/A. Reinisch, *Trans-*

The understanding of the term transparency varies. Here, the definition adopted by *Asteriti* and *Tams* is followed. Accordingly, transparency is the availability of information about the proceedings, whereas confidentiality describes the restriction of information about the proceedings to the parties. Correlatively, privacy describes limitation of access to the proceedings, whereas inclusiveness describes access to the proceedings to entities other than the parties.[62]

Investment tribunals specifically have come under pressure for 'obsessive secrecy' of proceedings resulting from the use of confidentiality-focused commercial arbitration rules in investment treaty arbitrations.[63] Critics have gone so far as to predict an end of investment arbitration due to its opacity.[64] Claims for increased transparency are justified on the same basis as those pertaining to the inclusion of public interest considerations.

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parency versus confidentiality in international investment arbitration – The Biwater Gauff compromise, 6 The Law and Practice of International Courts and Tribunals (2007), p. 97. See also J. Lacarte, *Transparency, public debate and participation by NGOs in the WTO: a WTO perspective*, 7 Journal of International Economic Law (2004), pp. 685-686 (He proposes alternative mechanisms, such as the creation of an Advisory Economic and Social Committee composed of NGOs, which would make recommendations on WTO reform to the membership. Alternatively, he favours a stronger involvement of parliamentarians.).

62 A. Asteriti/C. Tams, *Transparency and representation of the public interest in investment treaty arbitration*, in: S. Schill (Ed.), *International investment law and comparative public law*, Oxford 2010, pp. 787-816. A broader definition including opportunities for participation, awareness of and access to the dispute settlement process is proposed by L. Chin Leng, *The amicus brief issue at the WTO*, 4 Chinese Journal of International Law (2005), p. 86. See also N. Blackaby/C. Richard, supra note 44, p. 256.

63 J. Atik, supra note 42, p. 148; N. Blackaby/C. Richard, supra note 44, p. 253; T. Wälde, supra note 54, p. 550, FN 139. Of certain fame is a quote from a NYT article from A. De Palma, *NAFTA's powerful little secret: Obscure tribunals settle disputes, but go too far, critics say*, The New York Times, 11 March 2001 ('[Their] meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations changed. And it is all in the name of protecting the rights of foreign investors under the North America Free Trade Agreement.').

64 A. Mourre, supra note 23, p. 266 ('If the worries of the public are not properly addressed, States will step back from arbitration, and there is a risk that investors will, one day, be sent back to the old and ineffective mechanism of diplomatic protection.').

The instrument is presented as an agent of increased transparency together with other mechanisms, such as publication of judgments and awards.[65] In several investment arbitration cases, *amicus curiae* applicants opined that their participation would 'allay public disquiet as to the closed nature of arbitration proceedings.'[66] It is argued that enhanced *amicus curiae* participation may educate the public about international dispute settlement, which in turn may increase its acceptance.[67] Sporadically, doubts have been raised as to whether the instrument truly supports transparency. *Amici curiae* seek not merely to obtain information about the proceedings, but to participate in them. Given the amount of negative reactions this has generated in the WTO, *McRae* views *amicus curiae* as a roadblock to transparency.[68] In how far this is the case will be examined. Certainly, the instrument is dependent on transparency as the joint *amicus curiae* submission of the IISD and Earthjustice in *Methanex v. USA* shows. After the parties consented to open their proceedings to the public, the *amici curiae* realized that the respondent USA was defending the measures adopted against MTBE only on the basis of public health. They (unsuccessfully) petitioned the tribunal for permission to submit a post-hearing brief to argue that the measure also should be regarded as furthering environmental objectives.[69]

B. Presumed drawbacks

Despite its potential advantages, the admission of *amici curiae* to international proceedings entails risks. Especially states have expressed concerns

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65 Other tools to increase transparency include public registration of a case; publication of awards, submissions, decisions and case files; opening of hearings; and publication of interpretative notes. C. Knahr/A. Reinisch, supra note 61, p. 97.

66 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001, para. 5. See also *UPS v. Canada*, Petition by the Canadian Union of Postal Workers and the Council of Canadians, 17 October 2001, para. 3 (ii).

67 G. Umbricht, supra note 3, p. 783; C. Tams/C. Zoellner, supra note 28, p. 237.

68 D. McRae, supra note 25, p. 17. Critical also C. Brower, *Structure, legitimacy and NAFTA's investment chapter*, 36 Vanderbilt Journal of Transnational Law (2003), pp. 72-73.

69 K. Tienhaara, *Third party participation in investment-environment disputes: recent developments*, 16 Review of European Community Law and International Environmental Law (2007), p. 240.

with regard to the concept. They fear *inter alia* additional practical burdens (I.); a curtailing of the parties' procedural rights (II); a politicization of disputes (III.); additional burdens on developing countries (IV.); unmanageable quantities of submissions (V.); and a denaturing of the judicial function (VI.).

I. Practical burdens

Amicus curiae participation could entail practical burdens on the disputing parties and the court.[70] The concerns are largely twofold: *amici curiae* can cause a considerable increase in costs resulting from the parties' need to review and possibly respond to briefs.[71] Further, *amici curiae* may cause a significant delay in the proceedings, as international courts and tribunals need to add additional procedures and accommodate the parties' right to comment. In extreme cases, courts may feel the need to conduct an additional round of submissions on the issues raised in an *amicus curiae* brief.

II. Compromising the parties' rights

States have expressed concern that *amicus curiae* participation may also affect their procedural rights and their position in the proceedings.[72] These concerns must be taken seriously, because the violation of fundamental procedural rights by a tribunal may affect the validity of a judgment, award or decision. International courts and tribunals must apply standards that will ensure that the enforcement of a judicial decision is not at risk.[73]

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70 E. Levine, supra note 3, p. 219.

71 WTO General Council, *Minutes of Meeting of 22 November 2000,* WT/GC/M/60, Statement by Mexico, para 51.

72 See also A. Bianchi, supra note 26, p. xxii ('[I]n certain particular contexts, the increasing involvement of civil society groups and professional associations can be perceived by the 'users' of judicial mechanisms as an undue interference, and, potentially, a disruptive element in the complex process of interest-accommodation that third party settlement inevitably entails.').

73 M. Kurkela/S. Turunen, *Due process in international commercial arbitration*, 2nd Ed., Oxford 2010, p. 1 ('Making certain the award is enforceable is one of the most central duties of the arbitral tribunal.'). A violation of equality of arms can

One concern is obvious: the presentation of submissions in favour of one party may risk tilting the delicate procedural equality of the parties. It will be shown later that virtually all international courts and tribunals permit *amicus curiae* submissions to argue for or against a party. Further, it is common practice before WTO panels, the Appellate Body, investment tribunals and the ECtHR that the parties endorse arguments made by *amici curiae* without formally adopting them as their own.[74] Referring to the intense public campaigning by the *amicus curiae* applicants in and outside the proceedings against the claimant in *Biwater v. Tanzania*, a water-privatization-related investment dispute, *Wälde* argued that the risk of material inequality is real: '*Amicus* briefs can … directly or indirectly impugn the investor or the social acceptability of the investor's conduct, without supplying evidence or being subjected to cross-examination.'[75] This can entail a substantial financial and time burden for the claimants, as they must defend themselves against the respondent *and* the *amicus curiae* in and out of the proceedings. The possible inequality created by this additional support may be occasional or, where *amici curiae* tend to support one of the sides, structural.

Moreover, international courts and tribunals have explicitly acknowledged an obligation to resolve disputes in a speedy manner.[76] This issue has frequently been thematized in WTO dispute settlement. Article 12(2)

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lead to annulment of an award pursuant to Article 52 ICSID Convention as a serious departure from a fundamental rule of procedure.

74 E.g. *Kress v. France* [GC], No. 39594/98, 7 June 2001, ECHR 2001-VI; *Glamis Gold Limited v. United States of America* (hereinafter: *Glamis v. USA*), Respondent's submission on Quechan application, 15 September 2005. The USA supported the admission of the Quechan's submission, which argued that the California and federal governments' measures did not violate the BIT.

75 T. Wälde, *Equality of arms in investment arbitration: procedural challenges*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements: a guide to the key issues*, New York 2010, p. 178 [Emphasis added]; A. Menaker, *Piercing the veil of confidentiality: the recent trend towards greater public participation and transparency in investor-state arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements*, New York 2010, pp. 145-147.

76 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase),* Judgment, 5 February 1970, ICJ Rep. 1970, p. 31, para. 27 ('[The Court] remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.'); B. Cheng, *General principles of law as applied by international courts and tribunals*, London 1953, p. 295 ('[There is a] public need that there

DSU determines that 'panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process.'[77] These obligations may be compromised if *amicus curiae* submissions are made and accepted late in the proceedings or if submissions are extremely long or numerous.

III. Politicization of disputes, de-legitimization and lobbyism

Many WTO member states in reaction to the admission of *amici curiae* expressed the concern that matters not addressed in the WTO Agreements such as the environment, social or labour issues would suddenly be discussed in the realm of dispute settlement proceedings and disrupt the carefully negotiated trade system, provoke a clash of legal cultures and create additional burdens for already under-resourced developing countries.[78] Faced with hundreds of letters and submissions from individuals and non-governmental entities in *Nuclear Weapons* – which had been brought to the ICJ by the General Assembly after intense lobbying by NGOs – *Judge Guillaume* expressed his discontent by arguing that states and intergovernmental organizations required protection against 'powerful pressure groups which besiege them today with the support of the mass media.'[79]

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should be an early settlement of all disputes …, not to mention the consideration that time-limits once set should in principle be observed.'); A. Watts, *Enhancing the effectiveness of procedures of international dispute settlement*, 5 Max Planck Yearbook of United Nations Law (2001), p. 32.

77 See also *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 105; *United States – Tax Treatment for "Foreign Sales Corporations"* (hereinafter: *US–FSC*), Report of the Appellate Body, adopted on 20 March 2000, WT/DS108/AB/R, para. 166 ('The procedural rules of WTO dispute settlement are designed to promote … the fair, prompt and effective resolution of trade disputes.').

78 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Brazil, para. 46 ('[T]he dispute settlement mechanism could soon be contaminated by political issues that did not belong to the WTO, much less to its dispute settlement mechanism.'); WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Costa Rica, para. 70; G. Umbricht, supra note 3, pp. 773, 781, 787-788 (He considers the debate partly a clash of legal cultures. But this does not explain why except for the USA and the EU all WTO members have rejected *amicus curiae*.).

79 *Legality of the Threat or Use of Nuclear Weapons* (hereinafter: *Nuclear Weapons*), Advisory Opinion, 8 July 1996, Sep. Op. Judge Guillaume, ICJ Rep. 1996, p. 287.

The matter is exacerbated by transparency measures, which may prompt disputing governments to emphasize their national (protectionist) interests and refute attempts at negotiated settlements in an effort to save face and secure constituents' votes in the next national elections.[80] *Brühwiler* argues that this concern cannot be attributed to *amicus curiae*, because it is not the *amicus* submission that politicizes the dispute settlement system. The subject matter of the dispute attracts *amici curiae*.[81] Nonetheless, the information contributed by an *amicus*, as well as the manner in which it is presented may put a spotlight on politically sensitive aspects of the dispute which the parties did not intend to bring before the international court or tribunal (and which may not fall under its material jurisdiction).

Related hereto is the concern that the instrument further delegitimizes rather than legitimizes international dispute settlement.[82] It is said that especially financially powerful *amici curiae,* including foreign governments with different policies, might derail the proceedings with a hidden agenda. It is no secret that NGOs and other entities seek to push their own agendas through *amicus curiae* participation. Cases are chosen not solely for the interests engaged, but for the impact (and other benefits) *amici curiae* calculate generating through their participation.[83] Many NGOs do not seek to defend a public interest or common good, but an exclusive interest held by a few. Merely by powerful appearance and the presentation of 'the' (alleged) public interest, international courts and tribunals may be captured by the interest-groups' own interests without these interests necessarily

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80 P. Nichols, *Extension of standing in World Trade Organization disputes to non-government parties*, 17 University of Pennsylvania Journal of International Economic Law (1996), p. 314 (Arguing that granting of standing, as a stronger measure, would expose international dispute settlement to protectionist pressures, especially from interest groups.).

81 C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 Aussenwirtschaft (2005), p. 376.

82 Some argue that *amici curiae* should not be burdened with any additional requirements given their awareness raising function, which, in the view of some, is separate from representation. Others, in turn, demand that *amici* fulfil a set of criteria and doubt that *amici curiae* can act as legitimate representatives on the international level. See P. Spiro, *Accounting for NGOs*, 3 Chicago Journal of International Law (2002), pp. 161, 163; J. Dunoff, supra note 27, p. 438.

83 J. Cassel, supra note 4, pp. 113, 115; J. Viñuales, supra note 9, p. 75. Private entities dependent on public financing typically compete for public support. See S. Charnovitz, supra note 27, p. 363.

equalling those of the group they claim to represent.[84] Further, 'certain interests [may] exert disproportionate influence.'[85] Commentators agree that this risk is one pertaining largely to NGOs and their frequent lack of accountability and representativeness including towards the community whose values and interests they purport to represent.[86] *Bolton* even argues that 'the civil society idea actually suggests a "corporativist" approach to international decision-making that is dramatically troubling for democratic theory because it posits "interests" (whether NGO or businesses) as legitimate actors along with popularly elected governments.'[87] And *Blackaby* and *Richard* argue in relation to the admission of an US-based *amicus curiae* in *Biwater v. Tanzania*:

> The representative character and the source of the legitimacy of civil society groups seeking to submit *amicus curiae* briefs appear to be a common assumption. Yet the assumption may be flawed: how is, for example, a Washington-based NGO representative of Tanzanian civil society, and how is it best placed to advocate the interests of the Tanzanian people? Surely the state-party to the arbitration, if democratically elected, has far more legitima-

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84 J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 Kansas Law Review (2006), p. 1363, FN 134. See also M. Schachter, supra note 5, pp. 116-117 ('As an advocacy mechanism, [*amicus curiae*] is generally less expensive than lobbying efforts or the mounting of an extensive publicity campaign. *Amicus* participation is also less costly than the initiation of a separate lawsuit by the interested party.').

85 A. Reinisch/C. Irgel, *The participation of non-governmental organizations (NGOs) in the WTO dispute settlement system*, 1 Non-State Actors and International Law (2001), p. 130.

86 C. Brower, supra note 68, p. 73 ('[M]any NGOs have very specific agendas and are not accountable to their own members, much less to the general public.' [References omitted].); R. Keohane, *Global governance and democratic accountability*, in: R. Wilkinson (Ed.), *The global governance reader*, London 2005, p. 148 ('[NGO's] claims to a legitimate voice over policy are based on the disadvantaged people for whom they claim to speak, and on the abstract principles that they espouse. But they are internally accountable to wealthy, relatively public-spirited people in the United States and other rich countries, who do not experience the results of their actions. Hence, there is a danger that they will engage in symbolic politics, satisfying to their internal constituencies but unresponsive to the real needs of the people whom they claim to serve.').

87 J. Bolton, *Should we take global governance seriously?*, 1 Chicago Journal of International Law (2000), p. 218.

> cy to represent its constituents than unaccountable (and sometimes foreign) NGOs?[88]

In the WTO and investment arbitration, the concern over interest capture appears to be amplified by the fact that some view NGOs as striving to inscribe intrusive labour and environmental standards into the rule-book to reduce trade liberalization and the amount of foreign direct investment in developing countries.[89] Indeed, NGOs have publicly argued that *amicus curiae* participation before international courts and tribunals is an effective way to create publicity for the issues on their agenda and to push for novel interpretations.[90] In addition, it is feared that *amici curiae* may be partial towards one of the parties having received financial or other support from them, or that they lack the necessary expertise and experience regarding the issues commented on.

IV. Overwhelming developing countries

Another concern, which is mainly held by developing countries, is that most *amicus curiae* participants are well-funded Western non-governmental organizations.[91] It is assumed that they will largely oppose arguments presented by less developed or less affluent countries creating additional burdens for them and thereby deepening the structural inequality between the parties.[92] *Marceau* and *Stilwell* argue in respect of WTO practice:

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88 N. Blackaby/C. Richard, supra note 44, p. 269 [Emphasis added and references omitted].

89 P. Ala'ï, *Judicial lobbying at the WTO – the debate over the use of amicus curiae briefs and the U.S. experience*, 24 Fordham International Law Journal (2000), pp. 62-94.

90 J. Cassel, supra note 4, p. 116 ('A further reason why CIEL has chosen to petition the IACHR is that CIEL believes that such petitions can create publicity – and therefore increased awareness – of the link between human rights and the environment.').

91 H. Pham, *Developing countries and the WTO: the need for more mediation in the DSU*, 9 Harvard Negotiation Law Review (2004), pp. 350-351 (For developing countries, *amicus curiae* participation is one of the three most problematic issues concerning the DSU reform.).

92 S. Joseph, supra note 10, p. 321; D. McRae, supra note 25, p. 12; B. Stern, *The emergence of non-state actors in international commercial disputes through WTO Appellate Body case-law*, in: G. Sacerdoti et al. (Eds.), *The WTO at ten: the contribution of the dispute settlement system*, Cambridge 2006, p. 382 (*Stern* worries

> NGOs participating as *amici* have often represented, directly or indirectly, commercial interests. This fact concerns many WTO members, which believe that participation of *amici* will further shift the balance of WTO dispute settlement towards developed countries, their NGOs and their multinational corporations.[93]

V. Unmanageable quantities of submissions

Another concern is that international courts and tribunals will be flooded by numerous submissions many of which will not be of any assistance, but instead will hinder the court or tribunal in the exercise of its judicial mandate. This was one of the reasons for the ICJ's refusal to accept *amici curiae* in *South West Africa* (see Chapter 5).

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that some states could take advantage of *amicus curiae*: 'Even among the countries of the North, the unlimited acceptance of *amicus curiae* briefs would probably favour, in particular, the larger international NGOs, most of which would appear to be of American origin, as well as the extremely well-organized and powerful US lobbies. ... [I]t seems very likely that if there were unlimited authorization to file *amicus curiae* briefs, the big winner, in terms of relative influence, would be the United States.'). However, see C. Brühwiler, supra note 81, p. 370 ('In cases touching upon environmental or public health issues, *amici curiae* can indeed be termed as foes of developing countries – meaning their governments – as NGOs operating in these fields have defended conservatory policies they consider necessary, but which violated WTO agreements. At the domestic level, however, the same entities regularly represent interests that conflict with their government's programme: these NGOs engage for global issues and are not mere advocates of any governments.' She admits that the majority of *amicus* submissions stems from NGOs situated in developed countries.). See WTO General Council, *Minutes of Meeting of 22 November 2000,* WT/GC/M/60, Statement by Costa Rica, para. 70; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by India, para. 38 ('[T]he Appellate Body's approach would also have the implication of putting the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs who had much less resources and wherewithal either to send briefs without being solicited or to respond to invitations for sending such briefs.').

93 G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 Journal of International Economic Law (2001), p. 180 [References omitted]. See also R. Mackenzie, *The amicus curiae in international courts: towards common procedural approaches*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 300.

VI. Denaturing of the judicial function

This concern pertains to the separation of powers and the role of the judiciary. Courts are seized to decide concrete disputes. The participation of *amici curiae*, especially if pushing for the consideration of a broad public interest, could inject a legislative notion into the process.[94] In addition to having to decide the dispute between the parties, an international court or tribunal may suddenly feel pressured to accommodate the – possibly heterogeneous – interests of the public. As a result, a court might try to balance an unquantifiable number of interests, much like a legislature, and thereby lose sight of the parties before it. This risk is amplified on the international level given the absence of an international legislature to counterbalance judicial activism. While it may be valuable for a court to be aware of the broader implications of its decisions, it is questionable if the adjudication of such implications falls under its mandate. Further, the sphere of governmental responsibilities generally entails – also when appearing as a party or as an intervener (or in another capacity) – calling attention to public interest considerations.

C. Conclusion

The dramatic growth of international courts and tribunals and the ever-increasing number of international disputes has placed international adjudication in the spotlight. *Amicus curiae* participation and all the expectations and concerns related to it must be seen as a consequence of this expanding success.

The extent to which many of the above-outlined expectations and drawbacks materialize is largely a result of the content and regulation of *amicus curiae*. These, again, often mirror the initial reception of *amicus curiae* before each of the international courts and tribunals reviewed. The following Chapter therefore addresses *amicus curiae* participation from a historical viewpoint.

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94 Regarding *amicus curiae* participation before US courts in the 1960, *Barker* noted that: 'How groups bring issues to the court is strikingly similar to the way in which they bring issues to the legislature. … Just as group participation injects a more popular and majoritarian characteristic into the legislative process, it does the same for the judicial process.' see L. Barker, supra note 13, p. 62.

Chapter § 3 An international instrument

> *In common law countries, the amicus curiae brief, has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as a means for integrating and buttressing the authority and conflict-resolving capacities of domestic tribunals.*[1]

This excerpt from a letter by *Reisman* to the ICJ Registrar in the *South West Africa* advisory proceedings constitutes the first explicit request for participation as *amicus curiae* before an international court or tribunal.

Like many other procedural concepts used before international courts and tribunals, *amicus curiae* participation is a creation of national law.[2] It is prevalent in most common and a few civil law systems.[3] It is not surprising that – as in the case above – most of the initial *amicus curiae* submissions were made by entities from countries with a rich *amicus curiae* practice.[4] International courts and tribunals as well as *amicus curiae* peti-

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1 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (hereinafter: *South West Africa*), No. 21 (Letter from Professor W. Michael Reisman to the Registrar), Advisory Opinion, ICJ Rep. 1971, Correspondence, pp. 636-637.

2 C. Amerasinghe, *Evidence in international litigation*, Leiden 2005, pp. 24-27. For an overview over the use of national procedural law as a source for general principles of international law by international courts and tribunals, see M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 71-86.

3 See Part 18, Section 92 Rules of the Supreme Court of Canada, SOR/2002-156; Schedule 6(7), Standard directions for appeals to the New Zealand Judicature Act 1908. For *amicus curiae* in Ireland, see Irish Supreme Court decision *Iwala v. Minister for Justice,* 1 ILRM (2004), p. 27; Z. O'Brien, *Did the courts make a new friend? Amicus curiae jurisdiction in Ireland*, 7 Trinity College Law Review (2004), pp. 5-28. For the concept in the Australian legal system, see L. Willmott/B. White/D. Cooper, *Interveners or interferers: intervention in decisions to withhold and withdraw life-sustaining medical treatment*, 27 Sydney Law Review (2005), p. 600. For analysis of *amicus curiae* in Canadian courts, see S. Menétrey, *L'amicus curiae, vers un principe commun de droit procédural?* Paris 2010.

4 See *Winterwerp v. the Netherlands,* Judgment, 24 October 1979, ECtHR Series A No. 33; *US–Shrimp*, Reports of the Panel and the Appellate Body, adopted on 6

tioners have consulted national law in their dealing with *amicus curiae* in international dispute settlement.[5]

It is therefore useful to take a look at the instrument before national courts (A.) before examining the development of the international *amicus curiae* (B.).

A. Amicus curiae *before national courts*

This section first considers the origins of *amicus curiae* (I.) followed by the concept's use in the English legal system (II.) and in the US Federal Courts and Supreme Court (III.). The study of *amicus curiae* in these two common law systems is not only exemplary for *amicus curiae* in many other common law systems, but their approaches to the instrument have significantly influenced its development in international law and have facilitated its dissemination into several civil law systems as well as transnational and supranational instruments in the course of the growing interaction of national legal systems (IV.).

I. The origins of *amicus curiae*

The origins of *amicus curiae* are often attributed to Roman law.[6] It is said that *amici curiae* 'provided information, at the court's discretion, in areas

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November 1998, WT/DS58/AB/R; *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae'*, 15 January 2001.

5 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001; *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 8 ('[T]he tribunal assumes that the *amicus curiae* role the Petitioners seek to play in the present case is similar to that of a friend of the court recognised in certain legal systems and more recently in a number of international proceedings.'); *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001 (The tribunal consulted national legislation and case law on the issue of confidentiality in its decision on petitions from several non-governmental organizations to participate as *amici curiae*.).

6 For many, P. Dumberry, *The admissibility of amicus curiae briefs by NGOs in investor-states arbitration*, 1 Non-state actors and international law (2001), pp. 201-214; E. Angell, *The amicus curiae: American development of English institu-*